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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
LUIS MARIA ORTIZ AND TOMAZ ORTIZ. } No. 20.

SIERRA MOSCA GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This suit was instituted on Februrary 14, 1893, by the appellees, as plaintiffs, filing their petition in the Court of Private Land Claims, seeking the confirmation of the Sierra Mosca grant, situate in Santa Fe County, N. Mex., under a grant alleged to have been made to Juan

Luis Ortiz on June 4, 1846, by Manuel Armijo, then governor of the Territory of New Mexico, which they alleged constituted a full, complete, and perfect title to the same, the boundaries being described as follows:

> On the east by a high mountain, called the Mosca, or Slopes of Panchuelo; on the west, one-fourth of a league below the Waterfall (Salto del Agua) or Canada of the Springs (Canada de los Ojos); on the north by a little flat mountain and some ravines (arroyos) which run between north and west, and on the south by a rocky mountain that lies above the little river Chupadero, or boundary of the residents of the Tesuque River. (R., 1.)

It was alleged that on June 8, 1846, the said Juan Luis Ortiz was placed in legal possession of the grant by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in the Republic of Mexico. (R., 1.)

That the original papers relating to said grant were on file in the office of the surveyor-general of the Territory of New Mexico, known in that office as Private Land Claim No. 75; that on October 8, 1873, said grant was recommended by the surveyor-general of New Mexico for confirmation by the Congress of the United States, and in 1879 a preliminary survey was made of this claim by the United States, which survey covers an area of 33,250.39 acres, which the plaintiffs protested was not in accordance with the boundary calls set out in the act of possession in said grant, said boundary calls embracing about 115,200 acres. (R., 1–2, 77.)

The claimants alleged that they were the owners in fee of said grant by inheritance from their grandfather,

Juan Luis Ortiz, the original grantee, and by purchase from the other heirs of said original grantee; that the said grant was complete and perfect at the date the United States acquired sovereignty over the Territory of New Mexico, and that the land has been in the peaceable and undisputed possession of the original grantee and his successors in interest from the date of the making of the grant down to the present time. (R., 2.)

Other formal allegations were contained in the petition in compliance with the provisions of the act of Congress conferring jurisdiction on the Court of Private Land Claims.

On April 16, 1895, the United States filed an answer putting in issue generally the allegations of claimants' petition. (R., 4.)

Subsequently an amended answer was filed by the United States denying that the title papers presented by the claimants and purporting to contain the signature of Manuel Armijo were signed and executed by said Armijo or by anyone acting by his authority, and specifically denying that on June 8, 1846, the alleged grantee was placed in juridical possession of the alleged grant by Jose Dolores Trujillo, a justice of the peace, the amended answer alleging that said Trujillo was not at that time a justice of the peace or otherwise authorized by law to invest said grantee with juridical possession. (R., 5, 6.)

Prior to the institution of this suit in the Court of Private Land Claims, a petition was filed in the office of the surveyor-general of New Mexico on October 19, 1872, by the heirs of the original grantee under the eighth

section of the act of Congress of July 22, 1854, which petition asked for the confirmation of the grant under the existing laws of Congress (R., 75), but the petition does not name any individuals as claimants.

A hearing was had at which were presented the grant papers (R., 71–74), and testimony in support of the claim (R., 67–71), and on October 8, 1873, Surveyor-General Proudfit recommended the confirmation of the claim by Congress, stating—

> From the record presented, it seems that on the 3d day of June, 1846, Juan Luis Ortiz presented to Manuel Armijo, who was governor and commanding-general of New Mexico, which was then a department of Mexico, a petition for a grant of the land in question for agricultural purposes; that on June 4, 1846, Governor Armijo made the grant as requested; and that on the 8th day of June, 1846, Jose Dolores Trujillo, justice of the peace at Pojoaque, in whose jurisdiction the lands were situated, placed said Ortiz in juridical possession, as directed by the governor and in manner then in vogue in such cases, and the proof shows that Ortiz and his legal representatives have ever since remained in undisputed occupation of the estate.
>
> I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth, but the testimony brought before me, especially of the two last witnesses (Joab Houghton and Ramon Sena, R., 69–71), who beyond all question are highly respectable men, has set my mind at rest on that point, and I am now entirely satisfied of the good faith of the claimants, the regularity of the original proceedings, and the legality of the grant. At any rate, I have given

it the best investigation in my power before announcing this opinion, and can arrive at no other conclusion. (R., 76.)

On December 27, 1876, the claimants under the grant known as the Gaspar Ortiz y Pais grant, made in 1806, filed in the office of the surveyor-general a petition for leave to present evidence as to the invalidity of the Sierra Mosca grant alleged to have been made to Juan Luis Ortiz in 1846 and recommended for confirmation by the surveyor-general as stated, setting forth that said latter grant interfered with and wholly covered their own prior grant and that the title papers under which said grant was claimed were forgeries (R., 79).

Accordingly a rehearing was had before the then surveyor-general, at which testimony was taken (R., 81–113), and the surveyor-general recommended the rejection of the grant by Congress. His report in the matter is a careful résumé of all the proceedings had in that office in relation to this grant, and reviews the testimony presented at both the hearings. It is as follows (R. 113–117):

U. S. SURVEYOR-GENERAL'S OFFICE,
Santa Fe, N. Mex., March 27, 1886.

In pursuance of recent instructions from the Commissioner of the General Land Office, I now submit this supplemental report.

On October 19, 1872, S. B. Elkins and T. B. Catron filed in this office a petition, as is stated therein, on behalf of the heirs of Juan Luis Ortiz and those claiming under them, without stating the names of any of the petitioners or claimants as required by this office. It is set forth in the petition that said unnamed persons claim to be the owners of

a tract of land in Santa Fe County (New Mexico), by virtue of a grant made by Manuel Armijo, as governor of this Territory, on June 4, 1846, to Juan Luis Ortiz, and that, as the lands have never been surveyed, they are unable to state, even approximately, the quantity included within the boundaries given. (R., 75).

In support of the petition a paper in the Spanish language was presented, purporting to be a petition signed by Juan Luis Ortiz to the governor, bearing date June 3, 1846, and the decree of the governor thereon, dated June 4, 1846, together with a statement purporting to have been executed by Jose Dolores Trujillo on June 8, 1846, as a justice of the peace, certifying that as such he placed said Juan Luis Ortiz in possession of the land. (R., 71–74.)

A careful examination of this document and of the evidence upon the subject leads to the conclusion that it is forgery. It was never placed among the archives of the Territory, although the lands claimed are but a few miles from this city, which was the capital and depository of the official records in 1846; nor is there any evidence showing the whereabouts of the papers from their date until filed in this office.

Surveyor-General Proudfit made his report in the case October 8, 1873, his opinion occupying a page and a half of small paper. He had some doubt as to the validity of the papers, as shown from the following extract from his opinion: "I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth, but the testimony brought before me, especially of the two last witnesses, who, beyond all question, are highly reputable men, has set my mind at rest on that point, and I am now entirely satisfied of the

good faith of the claimants, the regularity of the original proceedings and the legality of the grant. At any rate, I have given it the best investigation in my power before announcing this opinion, and can arrive at no other conclusion."

He then recommends the confirmation of the claim. The evidence before him as to the validity of the papers is substantially as follows:

Antonio Sena stated he was 61 years old; that in June, 1846, he was prefect of the first district of New Mexico, and resided at Santa Fe; that he knew Juan Luis Ortiz, and he then lived at Pojuaque, near Santa Fe, and he died in 1855 or 1856; that in June, 1846, Manual Armijo was governor and Juan Bautista Vigil y Alarid was secretary of this Territory; that he knew the signatures of both of these officials, and that their signatures appearing on the original grant papers in this case are genuine; that he knew Jose Dolores Trujillo and his signature; that the witness appointed him justice of the peace of Pojuaque in 1846, and that his signature on the papers is genuine; that he was present when the grant was signed by Armijo in June, 1846. (R., 67, 68.)

Juan Pablo Dominguez stated that he was 60 years old, and resided in Santa Fe in 1846, and was a lieutenant in the Mexican army; that Manuel Armijo was then governor and Juan Bautista Vigil y Alarid was secretary of the Territory in 1846, and that Jose Dolores Trujillo was justice of the peace at Pojuaque in that year; that he knew the signatures of Armijo, Alarid, and Trujillo, and that their genuine signatures appear on the original grant papers in this case. (R., 68–69.)

Joab Houghton stated that he was 59 years of age, had resided in Santa Fe since 1843, and had

occupied the positions of first vice-consul of the United States, chief justice and associate justice of the supreme court, and register of the United States land office in this Territory; that he knew Manuel Armijo, governor, and Juan Bautista Vigil y Alarid, secretary of this Territory, quite well; had often seen them write and had been familiar with their signatures for twenty-five years. He stated that their signatures on the grant papers were genuine, though signed somewhat different from the usual way; that steel pens were used quite extensively at this place in 1846 and previously; that he brought them here in 1844, but he did not know of the Mexican officials using them in 1846; that Armijo was quite excitable in the summer of 1846 on account of the near approach of the American troops. (R., 69, 70.)

Ramon Sena y Ribera stated that he was 56 years of age; that in 1846 he was a lieutenant in the army stationed at Santa Fe, and knew governor Armijo and Juan Bautista Vigil y Alarid, secretary, and was acquainted with their handwriting; that their signatures to the grant papers are genuine; that he knew Juan Luis Ortiz from his youth; that Ortiz requested him to go with him to the governor when the petition was presented; that the governor directed a clerk to write the decree, and he and the secretary then signed and delivered it to Ortiz, and witness went with him to the justice at Pojuaque and was present when Ortiz was placed in possession, and he saw the justice write the statement reciting the fact. (R., 70, 71.)

This was the evidence before Mr. Proudfit, and, as stated by him, the two witnesses last mentioned "set his mind at rest" as to the genuineness of the papers. Although he had doubts, no witness was

called on the part of the Government, and with the exception of three questions put to Judge Houghton, no cross-examination was made of the witnesses presented by the claimants, notwithstanding the entire case depended upon the validity of the papers.

On December 27, 1876, Fiske and Stevens and R. H. Thompson, as part owners and attorneys for other owners of a portion of the land claimed by the representatives of Juan Luis Ortiz, filed in this office a petition stating that the papers in this case purporting to have been executed by Governor Armijo are forgeries, and asked leave to be allowed to produce evidence to show the fact (R., 79).

In connection with this petition there was filed an affidavit of Donaciano Vigil, in which he stated he was over 70 years of age; that he was secretary to Governor Manuel Armijo from 1838 to 1843, and was with him in 1846 when he left Santa Fe for Mexico; that he has examined the paper called the original grant paper in this case and that the name of Manuel Armijo signed on the margin of the same is not his genuine signature; that he had also examined a paper filed with his affidavit, marked "D," dated March 16, A. D. 1840, being an appointment of Miguel Antonio Lovato as captain in the Mexican army, and that such paper bears the genuine signature of Armijo, the body of said document being written by the deponent (R., 97, 98).

The name of Governor Armijo upon the Spanish document presented as evidence in this case is unlike any of his signatures to be found in this office, although there are many here upon records and papers belonging to the public archives. The name appears to have been written with a fine-pointed pen, and to explain this, no doubt, Judge Houghton was examined to show that steel pens were in use here

prior to 1846; but he stated that he did not know of the Mexican officials using them, nor is there any evidence that such was the case, but on the contrary all the records and papers belonging to the public archives at the time this Territory was taken possession of by the United States troops indicate that such pens had not been used by the Mexican officers. Fourteen signatures of Governor Armijo upon papers and records in this office, which are believed to be genuine, have been compared with his name on the paper presented by the claimants in this case, and there is a marked difference between them and the one in question. Three of these signatures were written in 1846, one on May 7 of that year, less than a month prior to the time it is claimed that this grant was made, and none of them indicate that he used a steel or any other kind of a sharp-pointed pen. Ten of these signatures were executed subsequent to the time Judge Houghton states he imported steel pens to this Territory, yet none of them appear to have been written with such a pen. April 16, 1846, is the last time his name appears to the proceedings of the Territorial deputation, and that is signed in his usual manner, and there is no indication about the records of such body that steel pens were used in recording its proceedings.

But few signatures of Juan B. Vigil y Alarid, who was secretary of the Territory when Armijo was governor, are to be found in this office, and for this reason it is difficult to form an opinion as to whether his name written upon the paper in question was written by him or not. It may be stated, however, that upon none of the numerous grant papers executed by Governor Armijo in the years 1843, 1844, 1845, and 1846, which are regarded as genuine, does the name of said Alarid appear, and it seems rather singular that he should have signed this one and

none other. A deposition is on file in this office of said Alarid, taken at this city in 1861, and if this claim is genuine it seems strange that the claimants did not present and prove it while the testimony of Alarid could have been obtained. Judge Houghton stated that Alarid and Armijo were dead, but did not give the dates of their deaths.

Under the petition presented December 27, 1876, as above stated, considerable evidence was taken as to the validity of the papers, the substance of which is as follows:

On December 28, 1876, Donaciano Vigil testified that he was 74 years of age; that from 1824 to 1846 he was connected with the office of military commandant in New Mexico, and was sometimes during that period temporarily connected with the civil government; that he was military secretary from 1836 to 1845, and was well acquainted with Governor Armijo, and that the governor was also military commandant during the time he was governor, and when this Territory was surrendered to General Kearney (1846) he was military secretary to Governor Armijo. He stated that he was well acquainted with the writing and signature of Armijo, and that the name upon what is claimed to be the grant papers in this case was not, in his opinion, written by Governor Armijo; that he had never seen a genuine signature of the governor like the one on the paper in this case; that the body of the document marked "D," attached to the affidavit of the witness filed with the petition of Fiske and Stevens, as above stated, was written by the witness, and was signed in his presence by Governor Armijo. This witness was rigidly cross-examined by T. B. Catron, attorney for claimants, and was repeatedly asked if he did not have a conversation with said Catron in Santa Fe, in 1872, at which time the paper in ques-

tion was shown him, and that he told said Catron that it bore the genuine signature of Armijo, but he denied ever at any time having any conversation with Mr. Catron on the subject, and no evidence has been produced to show that he had. (R., 99–101.)

A number of witnesses residing in and near Pojuaque in 1846 were examined in January, 1878, and by their evidence it is very conclusively shown that Jose Dolores Trujillo did not in 1846, or at any time, occupy the position of alcalde or justice of the peace. (R., 102–113 and 119–121.) This is the person who is shown by the papers to have placed Juan Luis Ortiz in possession of the lands claimed and to have acted as justice of the peace of Pojuaque in doing so.

The evidence further shows that Antonio Sena and Ramon Sena y Ribera are brothers-in-law of Gaspar Ortiz y Alarid (R., 103 and 110), the person who is shown by the evidence to be interested in the claim, said Sena and Rivera being two of the principal witnesses relied upon by claimants to substantiate the grant.

An examination of the document presented by the claimants suggests very forcibly the fact that it was mostly written by the same person and its general appearance denotes its want of regularity.

I am led to the conclusion by all the evidence in the case that the papers relied upon by the claimants were forged. The claim is certainly not established under the rule of law which requires it to be construed strictly against the grantee. As before stated, the papers presented were never deposited in the Mexican archives, nor is there any record of the grant having been made, so far as known.

I therefore recommend its rejection by Congress.

GEORGE W. JULIAN,
Surveyor-General.

All of the proceedings taken before the surveyor-general under the law of July 22, 1854, upon which the foregoing statement of facts is made, are part of the records of that office, and were introduced in evidence upon the trial in the Court of Private Land Claims either by the claimants or the Government, and each portion thereof mentioned in that statement is referred to at its proper place in the record, where it is to be found. These, together with the statements of Surveyors-General Proudfit and Julian, referred to, furnish a succinct history of the grant up to the institution of the suit for its confirmation in the Court of Private Land Claims.

The trial of the cause was entered into upon August 19, 1896, when the plaintiffs tendered in evidence their title papers, the genuineness of which was put in issue by the pleadings, as above set forth.

These grant documents were received in evidence over the objection of the Government (R. 10), and consist of the petition for the grant by the original grantee, the indorsement of Governor Armijo thereon, and the alleged act of juridical possession certified by Jose Dolores Trujillo. (R. 71–74.)

Oral evidence was offered by the plaintiffs tending to connect them with the alleged original grantee (R., 9–16).

Claimants also proved the death of several witnesses examined before the surveyor-general when this case was before him for consideration, and thereupon the testimony of these witnesses was received in evidence under section 5 of the act establishing the Court of Private

Land Claims (R., 8, 9). This testimony tended to establish the genuineness of the signatures on the muniments of title presented, two witnesses, Antonio Sena (R., 67, 68) and Ramon Sena y Ribera (R., 70, 71), testifying that they saw Governor Armijo sign the papers in question. It was shown that these two witnesses were sons-in-law of the alleged grantee and brothers-in-law of the principal claimant before the surveyor-general (R., 25, 26, 103, 110). Two other witnesses before the surveyor-general, Joab Houghton (R., 69–70) and Pablo Dominguez (R., 68–69) had testified that, in their opinion, the signature of Governor Armijo was genuine. Subsequently one of these witnesses, Pablo Dominguez, retracted by affidavit all of his testimony given before the surveyor-general (R., 145), and reference will be made hereafter to this affidavit and the circumstances of its being part of the record in this case.

The only evidence introduced by claimants to sustain their allegations of continuous occupation and possession of the land embraced in the alleged grant was three depositions (plaintiffs' Exhibits 1, 2, and 4, R., 67–71) taken before the surveyor-general, and the only references therein to such possession by the alleged grantee are the following sweeping and general statements:

> Q. Do you know whether Juan Luis Ortiz and his heirs have always occupied this land since the grant, and whether it has been reputed to belong to them?
>
> A. They have always occupied the land and it has been always reputed to be theirs. (Deposition of Antonio Sena, plaintiffs' Exhibit 1, R., 68.)

Q. Do you know, and if so, please state, who have occupied the land in this case since 1846, and who have been the reputed owners of the land?

A. The tract has been occupied by Juan Luis Ortiz and his heirs all the time, and has always been reputed to belong to them. (Deposition of Pablo Dominguez, plaintiff's Exhibit 2, R., 69.)

A. * * * Ortiz lived upon the land during his lifetime, and his heirs have continued to occupy it since his death, and it has been continuously occupied by him and them, and they have always been the reputed owners of the land, and respected as such. (Deposition of Ramon Sena, plaintiff's Exhibit 4, R., 71.)

As has been stated, it was shown that Antonio Sena and Ramon Sena, who testified so generously as to the possession by the grantee, were relatives of the claimants before the surveyor-general (R. 25, 26, 103), and that, subsequently, the only other witness relied on by claimants to show their possession of the land, Pablo Dominguez, retracted under oath his testimony given before the surveyor-general. (R. 145.)

Opposing their claim of possession, the United States introduced oral evidence to show that, prior to the presentation of this claim to the surveyor-general, it had never been heard of by people living on the land in question (R. 18, 19, 22); and that the alleged grantee about that time had attempted to purchase an interest in a prior grant to the same tract (R. 15, 21, 23), the theory of the Government being that the grant papers were fabricated about that time.

It also introduced the depositions of witnesses taken before the surveyor-general, at a rehearing of the case by

that office, to the effect that no such claim had ever been heard of by the people of the vicinage, nor had any possession or occupation under the alleged Sierra Mosca grant been know to them, but, as a matter of fact, the land was occupied and claimed by claimants under a prior and different grant.

Vide Defendant's Exhibit C. (R. 102–113.)

The testimony of the same witnesses before the surveyor-general was presented to show that the party professing to act as alcalde, in giving the juridical possession recited in the title papers, was in fact never such alcalde.

Vide Ibidem.

Oral testimony from aged men was also adduced to the same effect. (R., 26, 27, 29, 31.)

The archives of the office of the justice of the peace of that jurisdiction were brought into court, and it was by them shown that at the time when juridical possession is alleged to have been given by the alcalde, Trujillo, an entirely different person was alcalde, namely, Jesus Maria Serrano. (R., 81–93.)

Testimony as to an examination of these archives at the time of the presentation of the claim before the surveyor-general was also introduced, showing that there existed therein no appointment of said Trujillo as alcalde nor any record of official duties performed by him as such. (R., 64–67.)

On the question of the genuineness of the signatures of Governor Armijo and his secretary, the Government presented the testimony of Donaciano Vigil, military secretary to Governor Armijo, taken before the surveyor-general, tending to show that the alleged signature of

Armijo on the Sierra Mosca grant papers was not made by him. (R., 99–101.) Also the testimony of Will M. Tipton, special agent of the Department of Justice, assigned for duty in the office of the United States attorney for the Court of Private Land Claims. Mr. Tipton was for many years connected with the office of the surveyor-general of New Mexico, during which time he was clerk, copyist, translator, and custodian of the Spanish and Mexican archives in that office. By reason of this experience, it was shown that Mr. Tipton had acquired an intimate acquaintance with the various signatures attached to papers therein, especially the two signatures in question. Mr. Tipton also testified as an expert in handwriting. As a result of his critical examination of the signatures in question, both from the standpoint of an expert in penmanship and of one who had for years an intimate acquaintance with the archives, he testified with great positiveness that in his opinion the signatures in question were not genuine. Photographs of the signature of Governor Armijo in question (R., 128), and of another signature attached to Document A, in reported No. 61, in the office of the surveyor-general of New Mexico (R., 139), were also presented in evidence; also numerous papers from the archives containing the signatures of Governor Armijo and Secretary Vigil, as standards of comparison for use by the court. The reasons adduced by Mr. Tipton for believing the signatures in question to be not genuine are fully and clearly set forth in his testimony (R., 33–60), and it is desired to call the critical and careful attention of the court to the same.

While somewhat lengthy, his testimony is interesting in the extreme, and the results presented by him were not arrived at without the most careful study and thorough investigation. A reading of his testimony demonstrates that he is a chirographical expert and speaks intelligently of his work.

But, aside from Mr. Tipton's critical analysis of the alleged signature of Governor Armijo to this instrument, his long and continued association with the writings of that official during the period of his sixteen years' connection with the office of the surveyor-general, enables him almost intuitively to detect its spuriousness. His official life has been spent in the odor of these ancient documents and he is, by reason of his intimate and daily familiarity with them, better able perhaps than any other living man to discern a blemish in them.

The originals of the muniments of title introduced in evidence and the other documents presented as standards of comparison, which were examined and testified to by Mr. Tipton, are now in the custody of the clerk of this court for examination by it.

Aside from this question of fact, the legal contention of the Government was that the colonization laws of the Republic of Mexico in force at the date of the alleged grant conferred no power or authority upon the governor of the department of New Mexico to make a grant of any part of the public domain or to initiate proceedings for that purpose. The Government also contended that even if the governor had power in 1845 to make a grant under the colonization laws of August 18, 1824, and the regulations issued thereunder of November 21, 1828, the said

regulations were not complied with in this case in a single substantial particular, either in the petition, grant, or act of possession.

On December 1, 1896, the Court of Private Land Claims, through Mr. Justice Fuller, announced its decree confirming the grant as an imperfect or equitable claim, thus limiting it to 11 square leagues or 47,740 acres. The opinion is set out in the record (pp. 146–149).

Mr. Justice Murray, in a very able opinion (R., 149–153), dissented from the decision of the majority and sustained the contentions of the Government in every particular.

On June 29, 1897, the United States prayed and was allowed an appeal to this court.

ARGUMENT.

The decision of the Court of Private Land Claims in this case should be reversed and the claim rejected for the following reasons:

1. Under the colonization laws of the Republic of Mexico in force at the date of this alleged grant the governor of the department of New Mexico had no power or authority to make a grant of the vacant public lands of the nation or to initiate proceedings for that purpose, and the alleged grant is void for lack of power in the granting officer.

2. Assuming the grant to be genuine and to have been made under the colonization law of August 18, 1824, and the regulations of November 21, 1828, as contended for by claimants and as held by the court, this is not such a

claim as the Court of Private Land Claims had jurisdiction to confirm, it not being a claim "complete and perfect at the date of the treaty, nor one which claimant would have had a *lawful right to make perfect* had the territory not been acquired by the United States." (Subsection 1 of section 13 of the act of March 3, 1891.)

3. Assuming that the governor had power in 1846 to make a grant under the colonization law of August 18, 1824, and the regulations of November 21, 1828, the proof is insufficient to sustain this claim under the decisions of this court in the California cases, said regulations and the Mexican law not having been complied with in any substantial particular.

4. The muniments of title under which this grant is claimed are shown to be spurious.

I.

Under the colonization laws of the Republic of Mexico in force at the date of this alleged grant, the governor of the department of New Mexico had no power or authority to make a grant of the vacant public lands of the nation or to initiate proceedings for that purpose, and the alleged grant is void for lack of power in the granting officer.

Whatever may have been the powers of the political chiefs of the territories under the regulations promulgated by the President of the Republic on November 21, 1828 (*Hayes* v. *United States*, 170 U. S., 637, 644), it would seem that the manifest effect of the legislation applicable to the vacant lands of the Republic subsequent to the adoption of the constitution of 1836 not only de-

prived all territorial or departmental officials of power to dispose of the vacant public lands, but the policy of the Government and the laws passed in relation to colonization and the appropriation of the vacant public lands for the security and payment of the debts of the nation were all repugnant to any gratuitous colonization such as was attempted to be exercised by the former political chiefs under the law of August 18, 1824, and the regulations of 1828.

It is admitted at the outset that in the departments of the Californias and New Mexico governors very often assumed to grant the vacant public lands without apparently conforming to the law of August 18, 1824, and the regulations of 1828, and apparently ignoring the existence of the constitution of 1836 and the defined powers and duties of the governors of the departments under said constitution and laws passed in conformity therewith. In fact, they seem to have ignored the territorial councils and afterwards the departmental assemblies, whereas, under the regulations of 1828, before any act of the governor passed a definitively valid right, it was necessary to receive the concurrence of the territorial deputation or of the supreme government.

The test to be applied under the act creating the Court of Private Land Claims had been repeatedly announced, affirmed, and reaffirmed by this court, and at the outset Mr. Chief Justice Fuller, in the case of *Faxon* v. *United States* (171 U. S., 244–9), said:

> In order to the confirmation of any claim, the Court of Private Land Claims, under the act creating that tribunal (26 Stat., 854, c. 539), must be

satisfied not merely of the regularity in form of the proceedings, but that the official body or person assuming to make the grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to this court on appeal. (*Hayes* v. *United States*, 170 U. S., 637; *Ely's Administrator* v. *United States*, *ante*, 220.)

It is not possible to sustain this grant under the law of 1824 and the regulations of 1828, or under the laws in relation to the vacant public lands under the constitution of 1836, for it does not conform to the proceedings provided in any of them; nor was the officer who purports to have made the grant, to wit, the governor of the department, ever vested with authority to dispose of the vacant public lands; nor is it shown in any way that there was ever an attempt in any way to ratify such unwarranted exercise of power; nor is it a case where the grant can be treated as validated by presumption, for if it were permissible under the act of 1891 to presume the validation of the exercise of unwarranted and unlawful authority, yet there is no testimony, nor is there any condition surrounding this claim to warrant the application of such a presumption.

Subsequent to 1829 the financial distress of the Mexican Republic had become so alarming that it was imperative that all the sources of revenue should be placed within as safe and economical control as possible. This was attempted by a series of laws and treasury regulations which have been set forth and referred to in a number of cases before this court, notably, *Ainsa* v. *United States* (161 U. S., 209); *United States* v. *Coe* (170 U. S., 681,

S. C., 174 U. S., 578); *Hayes* v. *United States* (*ibid.*, 637), and the case of *Fuxon* v. *United States* (171 U. S., 244).

The laws in relation to revenue promulgated in 1831, just referred to, indicate the tendency of the legislation of the country to place all the property of the nation which could be properly applied to the production of revenue under the immediate control of the general department of revenues. It might well be contended that the laws and regulations of 1831 embraced within their scope and intent the vacant public lands situated in the territories of the Republic. They were certainly the property of the nation and could be subjected to the control of the revenue department for the purpose of producing income to assist in meeting the financial distress of the nation. It was provided that the proceeds from the national property should be collected by the commissariats under the immediate direction of the general department of revenues. If the effect of this legislation was to carry the vacant public lands within the territories under the control of the department of revenues, then it follows of necessity that the power and authority of the political chiefs and the territorial departments under the regulations of November 21, 1828, were by implication repealed and annulled as their exercise was inconsistent with the revenue laws of 1831. (Reynolds, pp. 151 to 161.)

But whether or not such was the necessary effect of this policy, it is certain that the legislation of the country after the adoption of the constitution of 1836 and the passage of the law of April 4, 1837, was certainly to modify materially the existing colonization laws, if not

to repeal them. (*United States* v. *Coe*, 170 U. S., 681, 696.) This law formed the basis for all subsequent laws upon colonization, and it is earnestly insisted on behalf of the Government that it was intended as a specific repeal of the former laws upon colonization (Reynolds, 222), except such provisions of the former as were specifically saved by the same.

It will be noted that article 11 of the law of April 6, 1830, which was reserved in force, had relation to the colonization of foreigners in the frontier States and Territories, and said article had reference to article 7 of the law of August 18, 1824, in relation to colonization of foreigners of adjacent countries in those States and Territories of the federation which adjoin their nation. It would seem from the law of April 4, and the reservation of the former prohibitions as to colonization of foreigners, that it is not reasonable to suppose that the gratuitous colonization laws and regulations could possibly have remained in force. It was said in the case of *Faxon* v. *United States* (171 U. S., 244, 254) that—

> In 1835 the State legislatures were abolished and departmental bodies established; and the bases for a new constitution were adopted, followed by such constitution dividing the country into departments, the interior government of which was intrusted to the governors in subordination to the General Government. (Mex. Laws, 75, 89, 230, 258.)

The division of the Republic, as indicated before, was accomplished by the abrogation of the office of political chief and the appointment of governors. As to the abolishment of the territorial deputations and the appointment of departmental boards, subsequently departmental

councils, the constitutional provisions and the laws passed in pursuance thereof were numerous and minute in detail, but nothing can be plainer than the fact that the colonization of the lands which are or should be the property of the Republic by sales, leases, or mortgages, as provided by the decree of April 4, 1837, was a declared purpose and direction that they should be taken out of the category of lands that could be gratuitously colonized. The vacant public lands in all the departments from this time on were continually dealt with by legislation by way of mortgages and sales.

Just prior to the enactment of the law of April 4, 1837, to wit, on January 17, 1837, all the real property of the nation that existed in all the territories of the Republic were adjudicated to the national bank for the redemption of copper coin. (Reynolds, 210, cited *United States* v. *Coe*, 170 U. S., 691.) This was followed by the law of March 20, 1837 (Reynolds, 211), wherein the powers and duties of the governors and the departmental councils were minutely defined. In article 59, section 3 (Reynolds, 220), it is provided "they can not exercise other powers than those which this law designates for them, the violation of this part of the article and the two preceding ones being a matter involving the strictest responsibility."

The general constitution of December 29, 1836 (Reynolds, 203, 208), also undertook to minutely define the powers and duties of the governors and the departmental councils, and contains the same restrictions, and in none of these, neither in the constitution nor in the

law of March 20, 1837, are governors empowered to gratuitously grant the public lands for any purpose.

On April 12, 1837, a national consolidated fund was created to secure the payment of the principal and interest of the public debt by which the Government especially mortgaged 100,000,000 acres of the public lands in the departments of the Californias, Chihuahua, New Mexico, Sonora, and Texas as a special guaranty fund until the extinction of the credits. It is also provided that if any of these mortgaged lands should be sold, they should be sold at the rate of not less than 4 acres to the pound sterling, and the proceeds thereof should be paid by the purchaser to the agent of the Government in London, who should apply the same to the payment of the bonds of said fund, and that the bonds were to be received in payment for said lands at the current market price of the same. (Reynolds, 223, cited Coe Case, *supra*, 691.)

On April 17, 1837, pursuant to the law of April 4, 1837, minute rules and regulations were provided for the collection and disbursement of the revenues of the Government. This law has been repeatedly under consideration by this court in the various cases cited *supra*, and it may be said to form the rules and regulations for the sales, leases, and mortgages of the vacant public lands, as well as all other property of the nation. The chief officer of this department was called the superior chief of the treasury. (Reynolds, p. 224.)

On September 15, 1837, a convention between the English bondholders and the Mexican Government was entered into. Article 4 thereof provides that the deferred

bonds should be received at any time in payment of the lands that may be found unoccupied in the departments of Texas, Chihuahua, New Mexico, Sonora, and the Californias at the option of the purchaser at the rate of 4 acres per pound sterling. This law repeats article 7 of the law of April 12, 1837, creating the national consolidated fund, adding the following (Reynolds, p. 229):

> ARTICLE 7. * * * The Mexican Government, besides the general mortgage contained in this article, expressly reserves by a public decree twenty-five million acres of the lands of the Government in the departments of closest communication with the Atlantic, and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds, in case it is desired to exchange them for lands; and if the Government sell them, the proceeds therefrom shall be devoted to the redemption of said bonds.

By law of December 7, 1837 (Reynolds, p. 230), it was made the duty of the governors "to preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter, until in the first or second session thereafter, the matter under consideration is more thoroughly examined into." (*Faxon* v. *United States*, 171 U. S., 255.)

On June 1, 1839, the convention of Mexican bondholders entered into on September 15, 1837, was approved. Article 3 provided:

> 3. With respect to the colonies that may be established by virtue of the convention, the Government shall see that the existing laws on colonization, or

those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself.

This law, in addition to approving the convention, provided that a bureau of colonization under the immediate orders of the supreme Government should be created as soon as possible. The regulations pursuant to the same were not adopted until 1846, when the bureau of colonization was provided by decree of November 27, 1846. (Reynolds, 261.) Regulations were promulgated and circulars issued to carry the same into effect on December 4, 1846. (Reynolds, 263, 281.)

From April, 1837, to October, 1841, the Government of Mexico was under the administration of General Bustamente as President, but upon the latter date he was driven from the capital and Santa Anna was placed in control of the Government under what were known as the bases of Tacubaya. (Reynolds, 234.) It is believed by counsel for the Government that these bases constituted a provisional constitution for the formation of the Government under President Santa Anna, retaining, however, the constitution of 1836 in force, except wherein modified by said bases or where inconsistent therewith.

It will appear by subsequent legislation that the laws on colonization just referred to were not changed by the new government, but recognized as in force. By law of December 16, 1841, the superior chief of the treasury, created under the law of April 17, 1837, was abolished, and his duties devolved upon the departmental treasuries. (Reynolds, 238.)

On June 13, 1843, bases for political organization of the Republic were adopted (Compiled Laws, Vol. IV, p. 429; Reynolds, 243), departmental councils were abolished, and the departmental assemblies created. This decree defines the powers and duties of the departmental assemblies, among which may be found (article 134, section 5):

> To decree what is convenient and in harmony with the laws with respect to the acquisition, alienation, and exchange of the property (*bienes*) that may belong to the community of the department. As to the alienation of lands (*terrenos*), the existing laws and what the colonization laws provide shall be observed. (Reynolds, 244.)

Governors are provided for and their powers and duties defined, and an examination does not disclose any power or authority upon the governor of the department to dispose of vacant public lands at his pleasure.

By law of December 9, 1843 (Vol. IV, Mexican laws, 666; Reynolds, 250), the value of public lands not on the frontier and not affected by any other obligation is applied to the payment of the credits caused by the redemption of copper coin.

On December 29, 1843, article 1 is construed to mean that it mortgages for the payment of the credits caused by the redemption of copper coin only a portion of the public lands equivalent in value to said debt. (Vol. IV, Mexican laws, 722; Reynolds, 251.)

August 4, 1846, the Plan of the Citadel was promulgated, which marked the end of the first epoch of the central system of government of Mexico (Reynolds, 253);

on August 22, 1846, the constitution of October 4, 1824, was provisionally reestablished (Reynolds, 256); on September 17, 1846, the revenues were classified (Reynolds, 257), and on November 27, 1846, a bureau of colonization was established pursuant to the law of June 1, 1839, which ratified the convention with the bondholders dated September 15, 1837 (Reynolds, 261). The organization of this bureau of colonization was, as above pointed out, followed by regulations dated December 4, 1846. (Reynolds, 263.) It seems impossible that the legislation above referred to, from 1837 to 1846, could have been in force in the various departments of the Republic and recognized as the law of the land, and yet the governors of the departments of New Mexico and the Californias have been empowered to continually dispose of the vacant public lands without limit or restrictions, conforming to no law, and without any known authority. It is clear that they did not conform to the law of August 18, 1824, and the regulations of 1828, but seemed to exercise the right of disposing regardless of any law or limitations that may have been imposed upon that exercise of power.

The object and purpose of this summary is to show that the vacant lands in the various departments were appropriated by law to purposes other than gratuitous colonization, and the officials and official bodies that might from time to time dispose of them or regulate the same were named and their duties defined, and in none of this legislation are the governors of the departments or departmental councils, boards, or assemblies authorized

to gratuitously grant the vacant public lands separately or concurrently. We have shown, as we think, an appropriation of the vacant lands in the Republic to the revenues of the country and the machinery for carrying the same into execution; and have shown the existence of the law of April 4, 1837, repealing the laws on colonization. Although Armijo, from 1842 down to 1846, sought at various times to dispose of vacant public lands in the department gratuitously and without restriction—a practice in which alcaldes, prefects, town councils, departmental assemblies, and other officials likewise indulged (see supplemental brief and abstract of archive in case of *Chaves* v. *United States*, No. 14, on docket of present term)—yet it appears by the above-cited law that he and they did so without authority. The only ground upon which the grant can be sustained is upon a presumption which is not applicable to the laws of the country or facts in the case. The cases which have been much relied upon as to the exercise of the granting power by royal governors and intendants-general have no application to the performance of any act by one who, as a public official, and not as a private agent of the King, can dispose of public lands only by virtue of a law authorizing him so to do. In the case of *Strother* v. *Lucas* (12 Pet., 410), so often quoted on the subject of presumption, the ground upon which that case really turned was not so much the secret instructions given the intendant-general, but that he, being possessed of vice-regal authority, could make the law himself and answer alone to his superior, the King; he was the *alter ego* for the King,

possessing general power and authority, and no one was authorized to inquire into the exercise thereof except his principal. This has no application in the powers and duties of public officials under laws limiting the same. (*United States* v. *Coe*, 170 U. S., 697; citing Cambuston's Case, 20 Howard, 59.)

It follows, therefore, that the granting document here produced, even if considered as genuine, has no validity, for the reason that Armijo, as governor of the department of New Mexico, had no power to make such a grant on June 4, 1846.

Upon this proposition the opinion of Mr. Justice Murray, delivered in the case of *Pinkerton* v. *The United States*, No. 46, in the Court of Private Land Claims for the confirmation of what is known as the Nolan grant, made by Armijo on November 18, 1845, is both thorough and instructive, and is attached to this argument as part thereof, marked "Appendix No. 1." This opinion is referred to by Justice Murray in his dissenting opinion in the case now under discussion (R., p. 151), and it is believed that the positions therein assumed are unanswerable.

II.

ASSUMING THE GRANT TO BE GENUINE AND TO HAVE BEEN MADE UNDER THE COLONIZATION LAW OF AUGUST 18, 1824, AND THE REGULATIONS OF NOVEMBER 21, 1828, AS CONTENDED FOR BY CLAIMANTS, AND AS HELD BY THE COURT, THIS IS NOT SUCH A CLAIM AS THE COURT OF PRIVATE LAND CLAIMS HAD JURISDICTION TO CONFIRM, IT NOT BEING A CLAIM "COMPLETE AND

PERFECT AT THE DATE OF THE TREATY, NOR ONE WHICH CLAIMANT WOULD HAVE HAD A LAWFUL RIGHT TO MAKE PERFECT HAD THE TERRITORY NOT BEEN ACQUIRED BY THE UNITED STATES."

Before entering upon a discussion of other questions arising upon the record, it seems proper to consider this most serious question affecting the jurisdiction of the Court of Private Land Claims to confirm this claim as presented. It will be noted from the record that the claim presented is based upon a concession alleged to have been made by Manuel Armijo, governor of the department of New Mexico, on June 4, 1846. The theory upon which the case was presented by claimants and decided by the court was that the grant was made under the colonization law of Mexico of August 18, 1824 (Reynolds, 124), and the regulations issued pursuant thereto on November 21, 1828. (Reynolds, 141). While this view is not concurred in by the Government, as has been argued hereinbefore under Point I, it is the position most favorable to claimants and the only one upon which they can with any plausibility ask for a confirmation. Assuming, therefore, that the law and the regulations above referred to were in force at the date of this grant, and assuming for the present the genuineness of the muniments of title presented, it is confidently urged by the United States that the claim as shown by the record is not within the purview of the act establishing the Court of Private Land Claims.

The phraseology of that act has been the subject of much consideration by this court in recent cases, and in

a number of such cases this court has emphasized the limited character of the jurisdiction to consider these claims confided to the Court of Private Land Claims. It is believed that, for the purpose of premising the conclusions herein sought for, no better presentation of this branch of the discussion can be offered than simply to quote from this court's decisions on the phraseology of the act of 1891.

Thus, in discussing that act, Mr. Chief Justice Fuller, in the case of *Ainsa* v. *United States* (161 U. S., 222, 223), says (the italics being the writer's):

> By the first subdivision of section 13 of this act it is provided that: "No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one *that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States*, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at such date already complete and perfect." Here, again, there are significant differences between this phraseology and that used in the act of March 3, 1851, c. 41, "to ascertain and settle the private land claims in the State of California" (9 Stat., 631), which provides that the board of commissioners thereby created, the district court, and this court, in deciding on the validity of any claim brought before them, should "be governed by the

> treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable;" that is, the decisions thereof given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities previous to the cession to the United States. (*Fremont* v. *United States*, 17 How., 542, 553.)

Continuing, the court in that case draws the distinction between the California act and the act of 1891, in the following language:

> But under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, *not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former Government, had the territory not been acquired by the United States*, and by the treaty no grant could be considered obligatory which had not been theretofore located.

This principle is stated with even more emphasis in the *Santa Fe Case* (165 U. S., 714 et seq.). Thus the head note of that decision is as follows:

> An inchoate claim, which could not have been asserted as an absolute right against the Government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims; but the duty of protecting such imperfect rights of property rests upon the political department of the Government.

And in an extended discussion of the subject, Mr. Justice White, speaking on behalf of the court, says:

> An inchoate claim, which *could not have been asserted as an absolute right against the Government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891* (*ch. 539*), *creating the Court of Private Land Claims* (*26 Stat., 854*), and therefore is beyond the reach of judicial cognizance.
>
> The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the Government. (*Les Bois* v. *Bramell*, 4 How., 449, 461; *Ainsa* v. *United States*, 161 U. S., 208, 222.) To the extent only that Congress has vested them with authority to determine and protect such rights can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property a party seeking relief must present for adjudication a case clearly within the act, or relief can not be given. (*United States* v. *Clarke*, 8 Pet. 436, 444.)
>
> Section 13 of the act provides that all proceedings and rights theretofore referred to in the act shall be conducted and decided subject to certain provisions therein enumerated and to the other provisions of the act. Among the provisions contained in section 13 is the following:
>
> "First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico

having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

By section 7 of the act the court was also required, in reaching a conclusion as to the validity of the claim, to be guided by the laws of nations, the stipulations of the treaties concluded between the United States and the Republic of Mexico of February 2, 1848, and December 30, 1853.

Although section 6 of the act also authorized the adjudication by the Court of Private Land Claims of all claims which the United States "are bound to recognize and confirm by the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," the meaning of the words "complete and perfect" is to be derived by considering the context and not by segregating them from the previous part of the sentence exacting that the claim must be one which the United States was bound to recognize and confirm by virtue of the treaty. These words are moreover controlled by the mandatory requirements of section 13.

Indeed, the controlling nature of the provisions of section 13 of the act of 1891 was considered and settled by this court in *Ainsa* v. *United States* (161

U. S., 208, 223), where, speaking by Mr. Chief Justice Fuller, it is said:

"Under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, *by right* and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

Although the act of 1891, in section 11, authorized a town presenting a claim for a grant to represent the claims of lot holders to lots within the town, this provision does not override the general requirements of the statute as to the nature of the claim to title which the court is authorized to confirm. The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of Congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851.

The act of 1851 authorized the adjudication of claims to land by virtue of any "right" or "title" derived from the Spanish Government, and conferred the power in express language on the board and court to *presume a grant in favor of a town*. The act of 1891 not only entirely omits authority to invoke this presumption, but, as we have seen, *excludes by express terms any claim* the completion of which depended upon a mere grace or favor of the Government of Spain or Mexico, and of the United States as the successor to the rights of these governments.

In *United States* v. *Sandoval* (167 U. S., 290 et seq.) the court discusses this same subject in the following language:

> By Article VIII of the treaty of Guadalupe Hidalgo of February 2, 1848 (and we are not concerned here with the treaty of December 30, 1853), Mexicans established in territories previously belonging to Mexico, and remaining for the future within the limits of the United States as defined by the treaty, were free to continue where they then resided, or to remove at any time to Mexico, "retaining the property which they possessed in said territories, or disposing thereof, or removing the proceeds wherever they pleased," and "in the said territories property of every kind now belonging to Mexicans not established, there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may acquire said property by contract shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." (9 Stat., 922, 929.)
>
> The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the Government to provide. In respect to California this was done through the establishment of a judicial tribunal, but in respect to the adjustment and confirmation of claims under grants from the Mexican Government in New Mexico and in Arizona Congress reserved to itself, prior to the passage of the act of March 3, 1891, creating the Court of Private Land Claims, the determination of such claims. (*Astiazaran* v. *Santa Rita Mining Company*, 148 U. S., 80; *Ainsa* v. *United States*, 161 U. S., 208, 222.)

By the act of March 3, 1851 (ch. 41, 9 Stat., 631), Congress created a board of land commissioners to determine claims to land in California asserted "by virtue of any right or title derived from the Spanish or Mexican Government." (Sec 8.)

Section 11 of the act provided that the board of commissioners thereby created, the district court, and this court, "in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable"—that is, the decisions theretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities previous to the cession to the United States. (*Fremont* v. *United States*, 17 How., 542, 553.)

Section 14 permitted claims of lot holders in a city, town, or village to be presented in the name thereof, and authorized the presumption of a grant to such city, town, or village when shown to have been in existence on the day named.

The act of March 3, 1891, is couched in different phraseology.

Section 6 authorizes any person or persons, or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico, "by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of

this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," to file a petition in the Court of Private Land Claims praying that "the validity of such title or claim may be inquired into and decided."

By section 7 it is provided that the proceedings should "be conducted as near as may be according to the practice of the courts of equity of the United States," and the court is empowered "to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe Hidalgo, on the 2d day of February, in the year of our Lord eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico on the thirtieth day of December, in the year of our Lord eighteen hundred and fifty-three, and the laws and ordinances of the Government from which it is alleged to have been derived."

Section 13 provides that all proceedings and rights thereinbefore referred to shall be conducted and decided subject to certain enumerated provisions and to the other provisions of the act.

Among the provisions contained in section 13 is the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United

States the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The seventh subdivision of the same section reads thus:

"No confirmation in respect of any claims or lands mentioned in section 6 of this act, or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty to the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than 11 square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim."

But this limitation does not, in our judgment, affect the construction of the act so far as brought in question in the case in hand.

The court then goes on to quote from *Ainsa* v. *United States* (161 U. S., 208, 223), above set forth; and from *United States* v. *Santa Fe* (165 U. S., 675, 714 *supra*). The opinion concludes as follows:

At the date of the treaty of Guadalupe Hidalgo, neither these settlers nor the town could have demanded the legal title to such lands of the former government, and the Court of Private Land Claims was not empowered to pass the title to either. *It is for the political department to deal with the equitable rights involved.*

The interpretation of the land court act as shown in the foregoing decisions is recited and approved in *Bergere* v. *United States* (168 U. S., 85), where the meaning of the first subdivision of section 13, for the confirmation of imperfect grants, is restated to be:

> Not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by "right" and not by "grace," have demanded that it should be made perfect had the territory not been acquired by the United States.

This subdivision of section 13 is also cited and applied in *Zia* v. *United States* (168 U. S., 207).

The *Cessna Case* (169 U. S., 187 et seq.) still further emphasizes the restricted character of the jurisdiction conferred by the act of 1891, in the following language:

> But even if there were an obligation on the part of this Government, either under the general rules of international law or the terms of the treaty of cession, to recognize plaintiffs' claim to this particular tract, yet the time, manner, and conditions of enforcing would depend upon the will of Congress; and in creating the Court of Private Land Claims, Congress has prescribed the character of claims which that court may determine and the conditions which must attach to any claim which it may enforce. This claim, even if the grant in its inception was valid, was not one which was within the province of the Court of Private Land Claims to approve and confirm. The eighth clause of section 13 forbids the confirmation of a grant made upon any condition or requirement, either antecedent or subsequent, unless it appears that such condition or requirement

had been performed within the time and in the manner stated in the grant. That certain conditions or requirements were attached to this grant is evident from a perusal of the application and the order. That they were not performed is admitted by plaintiffs. Their contention is that performance was prevented by the Mexican authorities, and having been prevented it should be considered that performance was waived and the title had become absolute. Whatever may be said as to the duty of this Government to treat a condition whose performance was prevented by the Mexican authorities as a condition performed does not detract from the proposition that the Court of Private Land Claims is not vested with such power. It is a mere creature of statute, with prescribed and limited powers. It has no general equity jurisdiction. It can confirm a grant made upon condition only when such condition was performed. It is not, under the statute, at liberty to treat anything as equivalent to performance. Cases in which there was no performance of the conditions of the grant are cases which must be considered as reserved by Congress for further action on its part. So that under the terms of the act creating the Court of Private Land Claims, even if there were no other objections to the proceedings, the admitted fact that the conditions and requirements of this grant were never performed is sufficient to justify the ruling of the court in dismissing the petition.

This brings us to consider the question of whether the grant here presented constitutes a perfect and complete title, or whether, if not complete and perfect, claimants under the former government would have had a lawful right—i. e., "by right and not by grace" (*Ainsa Case*,

supra), "an absolute right against the Government" (*Santa Fe Case, supra*)—to make it perfect and complete. If the proof presented brings the case within either of these two classes the Court of Private Land Claims had jurisdiction to confirm; if it does not, the petition must be dismissed and the claimants referred to Congress for any relief to which they may consider themselves entitled. The determination of the character of the title presented involves the necessity of considering the law under which claimants allege the grant to have been made, to wit, the law of August 18, 1824, and the regulations of November 21, 1828. The first of these is found on page 121 of Reynolds' Spanish and Mexican Land Laws, and sets forth the principles upon which colonization of the vacant land of the Republic should proceed. The Congress of the several States are (section 3) given power to "enact laws for the colonization of their respective demarcations;" but the matter of the colonization of the Territories, of which New Mexico was one, was left for future determination by the supreme Government (section 16). This matter was not acted upon by the supreme Government until four years later, when the regulations dated November 21, 1828, were issued. From the passage of the colonization law of 1824 to the promulgation of the regulations of 1828, the territorial authorities were without power to alienate the public domain, that authority being possessed solely by the supreme Government. (*Hayes* v. *United States*, 170 U. S., 637.) By the regulations of 1828, however (Reynolds, 141), the political chiefs of the territories

were given power to grant the public lands under the conditions named in those regulations, which, so far as they are material to the present inquiry, are as follows:

1. The political chiefs of the territories are authorized, under the law of the General Congress of the 18th of August, 1824, and under the conditions that will hereafter be stated, to grant the public lands of their respective territories to the contractors, families, or private persons, Mexicans or foreigners, who may apply for them for the purpose of cultivating them or living upon them.

2. Every applicant for land, whether contractor, head of family, or private person, shall apply to the political chief of the respective territory, with an application in which is given his name, country, profession, the number, nature, religion, and other circumstances of the families or persons whom he desires to colonize, and shall also mark as distinctly as possible and describe on a map the land he applies for.

3. The political chief shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th of August are found in the application, both as regards the land and the applicant, either that this latter be attended to simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant.

4. In view of all of which the political chief shall grant, or not, said application, in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited.

5. The grants made to private persons or families shall not be held to be definitely valid without the previous consent of the territorial deputation,

for which purpose the respective proceedings shall be forwarded to it.

6. When the political chief shall not obtain the approval of the territorial deputation, he shall report to the Supreme Government, forwarding the proceedings in the matter for its consideration.

7. Grants made to contractors for the colonization of many families shall not be held to be definitely valid until the approval of the Supreme Government is obtained, to which a report shall be made and the proceedings forwarded, together with the statement that may appear proper to the territorial deputation.

8. The grant asked for being definitely made, a document signed by the political chief shall be issued to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the laws, in virtue of which the possession shall be given.

9. The corresponding entries of all the applications presented and grants made shall be made in a book intended for the purpose, with the maps of the lands that shall be granted, and a detailed report shall be forwarded to the Supreme Government every quarter.

It should be added further that by the law of 1824, to which the regulations of 1828 were made subject (section 12), it was not allowed "that more than 1 square league * * * of irrigable land, 4 of temporal land, and 6 of range land be united as property in a single hand."

No laws of a foreign nation have ever been given more attention by this court and by subordinate American courts than has been bestowed upon this colonization law of Mexico of 1824 and the regulations of 1828. In the scores of claims presented in California these statutory

provisions have been scanned time and again, leading Mr. Justice Field to remark, in *Brown* v. *Brackett* (21 Wall., 389): "Every conceivable point respecting these grants [*i. e.*, Mexican grants in California], their validity, their extent, and the operation of decrees confirming claims to land under them, has been frequently examined, and the law upon these subjects has been repeated even to wearisomeness."

In the construction of the two laws above referred to we are therefore not without precedent to aid us in determining the character of the title here presented when tested by those laws.

It will be noted that the muniments of title presented show on their face (Record, 73) a petition dated June 3, 1846, signed by Juan Luis Ortiz, in which he asks for a grant of land therein described. This petition, while dated June 3, 1846, was apparently not presented to Governor Armijo until the next day, since the testimony of Ramon Sena (R., 71) is to the effect that Governor Armijo acted on the petition immediately on its presentation, and the latter's order is dated June 4, 1846. That order is as follows:

> SANTA FE, N. MEX., *June 4, 1846.*
>
> What is stated by the petitioner in the foregoing petition, asking that there be granted to him the public land which he describes in the same, being true, and this Government being convinced of the good reasons he sets forth, the petitioner will apply to the proper justice that he may place him in possession of the land solicited in entire conformity to the laws in the premises.
>
> ARMIJO.

On June 8, 1846, it appears (R., 74) that juridical possession was conferred upon Juan Luis Ortiz by Jose Dolores Trujillo, purporting to be a justice of the peace.

This constitutes the sum and substance of the documentary evidence of title offered.

Upon this record it is insisted by the Government, in the first place, that the concession made is not a perfect and complete title, for the reason that it was never approved by the departmental assembly of New Mexico, and under the Mexican law just quoted no title was complete and perfect without the approval of that body. That there was no approval by the assembly is shown both negatively and affirmatively by the record. Such approval is a matter of proof, and as there was no evidence produced by claimants to show an approval, this court must find, as did the court below (R., 149), that the grant was not approved. In addition, the minutes of the departmental assembly for the period in which this grant was made are a part of the Spanish and Mexican archives received by the officers of this Government and in the official custody of the suveyor-general of New Mexico. This court will take judicial notice of the contents of those archives (*Teschmaker Case*, 22 How., 405; *Romero Case*, 1 Wall., 743), but this is unnecessary for the records of the assembly for 1846 are a part of the record in this case (R., 39, 51), having been introduced by defendant in connection with Mr. Tipton's testimony. These records show absolutely no action upon or mention of the title in question, although the minutes of the session of June 4, 1846, are a part thereof, and upon the proof it is

thus affirmatively established that the concession by Governor Armijo was never considered or approved by the departmental assembly of New Mexico.

Under the regulations of 1828, above set forth, the political chief was authorized, on presentation of the petition and after certain preliminaries, to grant or not the application. (Sec. 4.) This grant, however, was not *definitely valid* without the previous consent of the territorial deputation to which in 1846 the departmental assembly corresponded, and for the purpose of obtaining that consent the proceedings were to be forwarded to that body. (Sec. 5.) If the territorial deputation declined to approve the concession it was the duty of the governor to forward the proceedings to the supreme Government (sec. 6); and it was not until the grant had been definitely made—i. e., either confirmed by the deputation or by the supreme Government—that the governor was authorized to issue a document "to serve as a title to the party in interest." (Sec. 8.)

A perfect title is one which does not require a further exercise of the granting power to pass the fee in the land; it is a title which conveys full and absolute dominion, not only as against all private persons, but as against the Government, and which may consequently not be disavowed by the political or granting power and stands in no need of reaffirmance from such a power.

Paschal v. *Perez*, 7 Tex., 348.
Hancock v. *McKinney*, Id., 384.
Stevenson v. *Burnett*, 35 Cal., 432.
Doe v. *Eslava et al.*, 9 How., 445.
Argument of Mr. Call, counsel for the United States in the Clarke Case, 8 Peters, 705 et seq.

As was said in *Steinbach* v. *Moore* (30 Cal., 508, 509):

> A title derived from that source [the Mexican Government] was not perfect while *any further act* was required on the part of the Mexican Government or that of the United States as its successor, in order to invest the claimant with the *entire legal title to* and the *absolute possession* of the specific lands granted.

It is very clear under these authorities that a concession under the regulations of 1828, made by the governor and not approved by the departmental assembly, fell far short of constituting a perfect title. It did not pass the fee simple title to the land, but at best an inchoate interest that might or might not develop into the fee. It did not convey full and absolute dominion, for the possession held under it was defeasible at any moment the assembly or the Supreme Government might see fit to act adversely upon the petition of the applicant. It was a title that might be disavowed by the political power at will, and it stood in need of further action from such a power to make it valid. Such a title belongs to the class denominated as imperfect, which are those in which there is not a complete segregation from the Crown lands or public domain, and in which there is not a definitive appropriation to private use by the consent of the sovereign powers.

The policy of the Mexican nation as revealed in the provisions of the regulations of 1828, requiring two authorities to concur before the fee vested and the title became "definitely valid," was not a new one. It was inherited from the S anish Government, the predecessor in sovereignty of the Mexican nation, and it was a

feature of the alienation of land by the Spanish Crown from a very early period.

Thus by law 16, title 12, book 4, laws of the Indies, promulgated June 16, 1617, before definitive title to the public lands passed against the Crown, the acts of the colonial officers were to receive royal confirmation. (2 White, p. 53, Hall's Mexican Law, sec. 26.)

Under the royal ordinance of November 24, 1735, it was necessary for those who received grants to apply to the King himself for the "confirmation of the same under penalty of losing them if they should not do so." (Reynolds, 50.)

The expense and inconvenience of securing approvals or confirmations from the Crown was so great, especially to those living beyond the seas, as to lead to the institution of a more convenient method of obtaining definitive titles by Spanish subjects to whom concessions had been made. This was provided in the royal cedula of October 15, 1754 (Reynolds 50), wherein the evils connected with the former system are set forth and provision is made for the future alienation of Crown lands. Thus, under that cedula, the Viceroy and presidents of the royal audiences were empowered to appoint subdelegates with authority to make sales and compositions of Crown lands in New Spain, and the subdelegates in their turn were also authorized to appoint deputies in distant provinces. It was further provided that the subdelegates should forward the original proceedings had by them on land locations to the audiences for approval, and when approved by the audiences, the subdelegates issued the

titles which were then sent to the audiences for confirmation. In section 12 (Reynolds, 55) it is provided that "in provinces remote from the audiences or where the sea is between * * * confirmation shall be made by their governors with the approval of the royal officers and acting attorney-general, where there is one."

This system was subsequently displaced by that provided in the ordinance of intendants dated December 4, 1786 (Reynolds, 59), which provided that officers of the Crown called intendants were empowered to make sales and compositions of the Crown lands in their several provinces. The original proceedings had by them were (article 81) to be forwarded to the superior board of the treasury for approval. The intendants issued the titles upon such approval, and the titles were again forwarded to the board for confirmation.

By the royal cedula of March 23, 1798 (Reynolds, 65), it was provided, upon considerations of economy and convenience similar to those recited in the cedula of 1754, that the transmittal of the final titles to the supreme board of the treasury for confirmation should be dispensed with upon the payment of 2 per cent of the price, but this provision did not dispense with the transmittal of the original proceedings had by the intendants as required by article 81 of the ordinance above referred to.

A similar provision appears in the royal order of February 14, 1805. (Reynolds, 68, 73.)

These royal decrees, some of which were observed as in force up to the very date of the Mexican independence, have been considered in cases decided under the

Louisiana and Florida acts, and the construction uniformly given by this court in such cases has been that concessions unapproved by the proper authority constituted not a perfect title, but an incomplete and imperfect title, depending, since the treaty, for its completion upon the action of the political authorities of the United States.

Thus, the case of the *United States* v. *Arredondo* (6 Peters, 691) recognizes the difference between perfect and imperfect grants under the Spanish régime in the following language (p. 717):

> The whole legislation of Congress from 1803 to 1828 in relation to the three classes of cases, so far as respected Spanish titles, is of a uniform character in cases of corresponding description. The rules vary according to the kind of title set up; distinctions have been made in all the laws between perfect or complete grants fully executed or *inchoate incomplete ones, where a right had been in its inception under or by color of local law or authority, but required some act of the Government to be done to complete it.*

The case of *Menard's Heirs* v. *Massey* (8 How., 293) was one involving a grant made on November 8, 1799, by the lieutenant-governor of Louisiana, but not approved by the intendant-general of the province. The court, in discussing the dignity of the grant document presented, says (p. 303):

> That the lieutenant-governor of Upper Louisiana had the authority, as a subdelegate, under the intendant-general of the provinces of Upper and Lower Louisiana and Florida, to make concessions is undeniable; he could and did deal with the public domain of the province, made concessions,

directed the land to be surveyed, and caused grantees to be put in possession. This, however, does not settle the question. It does not depend upon the existence of power or want of power in the lieutenant-governor, but on the force and effect of the right his concession conferred. Did it give such a vested title in the soil as the Spanish Government could not legally disavow it? Or could the intendant-general, representing the royal authority, lawfully refuse to confirm the concession and order the grantee to be turned out of possession? If it be true that the title ended with the concession, survey, and occupancy of the land granted, then it follows that the title was completed and perfected under the Spanish laws by these acts; nor was a confirmation from any higher power than the lieutenant-general at all necessary, the grantee having all the title that the King could give.

The court after considering the question of whether the approval of the intendant-general was necessary, in the course of which article 81 of the laws of intendants, above referred to, is discussed, arrives at the following conclusion (p. 306):

> The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant governors and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or someone for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor or omit it. If he presented it, and the land was laid off, then it was the surveyor's duty to record

> both the concession and plat, together with the process verbal. But this did not make the party owner. Without the further act of the King's deputy—intendant-general—the title still continued in the Crown.

A comparison of the granting order in the case just quoted from with that alleged to have been made by Governor Armijo in this case will show that the former case was much stronger than this latter. In the former case the governor "grants the petitioner the land which he solicits;" in the case at bar the governor uses no words of grant, but simply directs the petitioner to apply to the proper justice that he may place him in possession of the land solicited. If the grant made in the case of *Menard's Heirs* v. *Massey*, containing words of grant and showing an evident intention by the subdelegate to pass the title, so far as lay within his power, was "a mere loose order of survey" and at best an imperfect title, how much more so was the order made by Armijo simply conferring possession and not even purporting to make a grant.

In the *Glenn Case* (13 How., 250) a concession was made by the commandant of the post of New Madrid, who exercised the power of subdelegate and had authority, under the instructions of the governor-general of Louisiana, to made conditional grants of land. The court holds, however, in passing upon the character of the title thus conveyed:

> By the Spanish regulations Clamorgan was not recognized as owner of a legal title without the further act of the King's deputy, the governor-

general; or the intendant-general, after the power to make perfect grants was conferred on him. *Until this was done, the legal title remained in the Crown.*

In *Paschal* v. *Perez* (7 Tex., 367), the supreme court of Texas, in an opinion that has been often quoted, discusses the question of whether the title there presented was complete and perfect or imperfect and inchoate. The court says:

> It will not be necessary in this case to enter into a disquisition as to the extent of the power of the governor of the province of Coahuila to grant lands in 1807. The titles shows upon its face that his act was not the final exercise of the granting authority over the lands. It is true that he adjudicates them to the applicant, orders their survey, and that the party be put in possession, and that all these measures were fully executed; but he further directs the grantee to apply at the intendancy of San Luis Potosi to obtain titles of confirmation, and this, in conformity with the royal cedula of the 14th of October, 1805. It appears from the title itself that, by a royal order of a late date, the governor did not possess the power of complete alienation over the public domain; and his authority was limited to the incipient measures in the transfer of lands, and these were subject to the revision, and necessarily required the approval of a superior authority. The royal order, referred to in the title, has not been produced, nor has it been accessible to the court; but, with reference to the power of the intendant over the public lands, it can not materially vary from the provisions of the general law, viz, the royal ordinance for the establishment and instruction of the intendants of the army and province of New Spain.

The court thereupon quotes article 81 of the ordinance of intendants, above referred to, and proceeds:

> Was the act of the governor final, or was it under the control of the intendant, depending for its validity upon his confirmation; was it one which the latter could have affirmed or disallowed; might the grantee have been retained or lawfully turned out of possession?
>
> This question has been decided by the governor himself. He does not assume to exercise conclusive authority. The grantee is expressly referred to a superior officer for confirmation.
>
> If we say that the act of the governor is final, we must assume, contrary to the usual presumption, that he was ignorant of the extent of his authority and of the laws under which he was acting. If he were, in point of fact, mistaken, if no act of the intendants were necessary to pass full title, his mistake should not operate to the prejudice of the grantee. But so far as we are informed of the laws then in force, they were not misunderstood but correctly interpreted by the governor. The intendant, in the language of the ordinance, was made the exclusive judge of causes and questions arising about the sale, composition, or grant of lands.

The court then quotes from Menard's Heirs' Case, *supra*, as to the necessity of approval by the intendant-general in order to vest a complete title, holding that case to be decisive of the character of the title presented, which was accordingly adjudged upon its face to be inchoate.

Thus it may readily be seen that the system of colonization embodied by the Mexican Government in the regulations of 1828, by which the passing of the fee was made dependent upon the concurrence of the political

chief and the deputation of the territory, was really a continuation of the Spanish system above outlined. Until the deputation or assembly approved the grant the title was imperfect.

The dignity of a concession made under Mexico by the political chief, and not confirmed by the deputation or supreme Government, has been repeatedly considered by the California courts and this court in cases arising under the act of March 3, 1851, for the adjustment of titles in California. The following are some of the cases bearing upon this proposition:

In *Chipley* v. *Farris* (45 Cal., 538) it was held:

> The claimant did *not have a perfect title* when he presented his petition for confirmation, *for the reason, among others, that the grant had not received the approval of the departmental assembly*, and, as it was requisite for the claimant to present his claim for confirmation as provided for in the act of 1851, he could not acquire, under the law then or subsequently in force, a perfect title except by means of a patent, or a survey confirmed in accordance with the act of July 14, 1860.

A similar case was *Taylor* v. *Escanden* (50 Cal., 428), where, in an action of ejectment, defendant relied upon a grant issued in 1845 by the Mexican Government to two grantees. The court says:

> But the grant of 1845 was never presented to the authorities of the United States for recognition or confirmation. It is claimed, however, that it was a perfect grant, and need not have been presented for confirmation under the act of Congress referred to. Upon this point it is sufficient to say that the grant of 1845 appears never to have been approved by the

> departmental assembly during the Mexican domination in California, and it is settled that *a grant lacking such approval is not a perfect or definitive grant* (citing *Miller* v. *Dale*, 44 Cal., 562, and *Chipley* v. *Farris*, 45 Cal., 527, *supra*).

Judge Hoffman, in the *Cruz Cervantes Case* (1 Hoff., pp. 10, 11), states the law succinctly when he says: "To constitute a definitely valid or complete title two things are necessary—*First*, a concession by the governor, and, *second*, the approval of the territorial deputation, or, in the event of their refusal, by the supreme Government." He goes on further to say that the deputation "possessed not merely a qualified right to take from a petitioner land already absolutely granted to him, but it was the right to say whether or not the land should be granted to him at all; and until the deputation or the supreme Government had consented to the grant, the absolute or complete title can not be deemed to have passed out of the Mexican nation."

In the *Reading Case* (18 How., 7) this court says, in response to the argument made by the United States, that no right passed by the grant, as it had not received the approval of the departmental assembly:

> Our examination of the decrees of August 18, 1824, and November 21, 1828, leads us to a different result. A right and title passed by the governor's grant, but its definitive validity was suspended for the approval of the assembly; and so it continued to be suspended until its approbation had been given, when the title became definitive. * * * Such grants so circumstanced are *equitable titles*, protected by the treaty of Guadalupe Hidalgo and by the laws and usages of nations concerning the rights

of property, real and personal, of the inhabitants of a ceded or conquered country.

In the *Hartnell Case* (22 How., 289) the relations of the deputation or assembly to the governor in the matter of concessions of land are discussed. In that case it will be noticed that the assembly, in the exercise of its supervisory powers over the governor in the matter of grants, reduced a grant made by the governor from 11 to 6 leagues, thus showing that the concession made by the governor was not a final title, nor did it vest a perfect and complete interest. The court, in discussing the power of the assembly thus to reform a grant made by the governor, says:

> The public domain was the property of the Mexican nation, and those who were enabled to displace that title, separate portions of it from the public lands, and vest such portions into individual proprietors by perfected titles could only do so in the exercise of sovereign power, because the public title was a sovereign right; and agents who assumed to exercise this authority must show that they represented the nation. The governors of California do not show that they did represent the nation, so as to *conclusively* bind it. To have this effect the governor's grant must have the *concurrence of the departmental deputation*. It follows that the assembly was *the controlling power*, and *could reform or nullify the governor's grant;* and, having reformed it to the extent of 5 leagues in the case before us, the claimant came in under the treaty of peace with Mexico, having no interest in these 5 leagues.

The *Workman Case* (1 Wall., 761) holds:

> Ample power was conferred upon the governor of California to grant vacant lands belonging to the

> supreme Government. Such authority was derived from the colonization law of the 18th of August, 1824, and the regulations of the 21st of November, 1828, as has been affirmed by repeated decisions of this court. But all of these decisions proceed upon the ground that the authority conferred is limited and restricted to the granting of unoccupied public land. Grants under those laws were required to be made *subject to the approval of the* departmental assembly, and, consequently, unless such approval was obtained, *the title was not regarded as perfect and complete.*

The case of *Beard* v. *Federy* (3 Wall., 478), is perhaps the leading one on this question. This was a suit in ejectment brought by one Federy, claiming title under a patent of the United States issued pursuant to a confirmation under the act of March 3, 1851, against Beard, who relied on a title derived under a grant made by Governor Pico, but not presented to the board of land commissioners constituted by the act of March 3, 1851. Beard sought to avoid the bar imposed by that statute upon grants not presented, in the contention that his grant, although not approved by the departmental assembly, constituted a perfect and complete title and its presentation to the commission was unnecessary. The court, in response to this contention, held that the grant was at best an imperfect one, and uses the following very pertinent language:

> The court treated the grant as one in colonization. All such grants, it is a matter of common knowledge with the profession in California, were made *subject to the approval* of the departmental assembly. Until such approval they were not definitely valid;

> and no such approval was obtained of the grant in question previous to the 7th of July following, when the jurisdiction of the Mexican authorities was displaced and the country passed under the Government of the United States. It remained for the new government succeeding to the obligations of the former government to complete *what thus remained imperfect*. By the act of March 3, 1851, the Government has declared the conditions under which it will discharge its political obligations to Mexican grantees. * * * It is not necessary to express any opinion of the validity of this legislation *in respect to perfect titles acquired under the former government*. Such legislation is not subject to any constitutional objection so far as it applies to grants of *an imperfect character* which requires further action of the political department to *render them perfect*.

The *Vigil Case* (13 Wall., 450) involves a grant made by Governor Armijo on December 28, 1845. This is the same official alleged to have made the grant now under consideration. In this case the court, after stating that the policy of the Mexican Government, as embodied in the law of 1824 and the regulations of 1828, recognized the obligation resting on the Government to hold the public lands as a public trust, and that the legal right to dispose of them for objects other than settlement and agriculture was withdrawn from the local authorities and rested alone with the supreme Government, proceeds as follows:

> If the policy of the law were wise, so were the regulations established for the purpose of carrying out its provisions. These regulations conferred on the governors of the territories, "the political chiefs," as they are called, the authority to grant vacant

> lands, and did not delegate it to the departmental assembly. It is true the grant *was not complete until the approval of the assembly, and in this sense the assembly and governor acted concurrently,* but the initiative must be taken by the governor. He was required to act *in the first instance* to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. In case the information was satisfactory on these points, he was authorized to make the grant and *at the proper time to lay it before the assembly,* who were required to give or withhold their consent. They were in that respect an *advisory body* to the governor, *and sustained the same relation to him that the Senate of the United States does to the President in the matter of appointments and treaties.*

The case of *Henshaw* v. *Bissell* (18 Wall., 255) is one in which the contest was between two conflicting grants, each covered by patents issued pursuant to confirmation by the California commissioners. One of the grants was made by the governor and approved by the departmental assembly. Of this Mr. Justice Field says, speaking in behalf of the court:

> His title, it is true, was imperfect in its character and subject to various conditions, but when approved by the departmental assembly it became, in the language of the regulations of 1828, "*definitely valid,*" and the estate granted was not afterwards liable to be divested except by regular proceedings on denouncement. The power of the governor over it had ceased. He could neither revoke the grant nor impair the interest of the grantee by any attempted transfer to others.

The court refers to the case of *Beard* v. *Federy*, *supra* (3 Wall., 479), and some California cases as not in conflict with the views expressed, saying: "These cases were all actions of ejectment in which *imperfect or equitable* claims or interests arising since the acquisition of the country were set up against the legal title held under patents," the reference to the claims set forth in those cases as "imperfect or equitable," being several times reiterated (p. 266).

In *Van Reynegan* v. *Bolton* (95 U. S., 35) the court says, speaking of Mexican grants made under the law of 1824 and the regulations of 1828:

> All of them were made *subject to the approval of the assembly of department*, and until they received such approval the estate *granted was liable to be defeated*.

It is believed that the authorities just cited leave no room for doubt that a grant such as that now under consideration, unapproved by the departmental assembly, was imperfect and inchoate at the date of the treaty of Guadalupe Hidalgo. In this view the court below evidently concurred, for in its opinion (R., 149) the following appears:

> The plaintiffs claim that the grant is a perfect grant, but the court holds that such is not the case. It is an imperfect grant, as there never was any approval of it by the departmental assembly. The court therefore holds that the grant should be confirmed for the land embraced in the boundaries not exceeding 11 square leagues.

The decree (R., 147) finds "as a matter of law that by reason of the facts aforesaid an *imperfect* or *equitable title and right*, such as the United States, under the stipulations of the treaty of Guadalupe Hidalgo, ought to recognize and confirm to the said land, was vested in the said original grantee."

The concession presented being clearly not a perfect and complete title, and being therefore not cognizable by the Court of Private Land Claims under that branch of its jurisdiction, the further question arises as to whether it is cognizable under the second branch of the court's jurisdiction—that is, "Is it a grant such as claimants would have had a lawful right to make perfect had the Territory not been acquired by the United States?" (Sub. 1 of sec. 13 of the act of March 3, 1891.)

The authorities above cited all bear upon this question to a greater or less extent, and its determination has been involved in considering the necessity for the approval of the governor's acts by the assembly in order to vest indefeasible title. It may assist in the discussion to revert again to the order of June 4, 1846, alleged to have been made by Governor Armijo. That order (R., 73) does not contain words of grant, but simply recites that what the petitioner states is true, and that "this Government being convinced of the good reasons he sets forth, the petitioner will apply to the proper justice that he may place him in possession of the land solicited in entire conformity to the law in the premises." This is not a decree making a grant, but an order allowing petitioner to go into possession of the land. It conveys no fee and

vests no interest, but so far as appears is a mere provisional permission to occupy the land such as, even under the liberal provisions of the California act, was repeatedly held to give claimants no right to a confirmation. While there is not elsewhere throughout these proceedings the slightest indication of a desire by the alleged granting power to comply with the regulations of 1828, under which it is claimed he proceeded—a matter that will be considered under Point III hereinafter—the remarkable order above quoted, alleged to have been made by Governor Armijo, but made, if at all, without regard to a single preliminary required by law, may find some explanation in the remarks of Judge Field on the practice of the governors of California, found in *Mahoney* v. *Van Winkle* (21 Cal., 577–579).

> If there be a surplus within the designated boundaries of the tract over the specific quantity alleged by the grantee in his petition, or intended to be ceded by the grant, the Government can at any time, by directing its measurements and segregation, restrict the grantee's possession. * * * Under that law the segregation was effected by the ceremony known as the delivery of juridical possession. But this proceeding could *not be legally taken at all until the concession had been approved by the departmental assembly*, and such approval was often delayed for years. In numerous cases it had not been obtained when by the conquest the jurisdiction of the assembly was displaced. Yet the grantee generally took possession at once upon the issuance of the grant, and his possession was respected, both by the authorities of the Government and the adjoining proprietors. It is true the Mexican regulations of 1828 contemplated that the approval of

> the departmental assembly should be obtained to the concession of the governor before the definite grant issued. So where the grantee regularly received his title papers the concession was final. The law then intended an immediate delivery of the possession by the proper magistrate of the vicinage. * * * But in time the *practice grew up of issuing the final title papers without waiting for the approval of the departmental assembly*, and, as juridical possession could not regularly be made previous to such approval, a provisional possession of the entire tract designated was permitted.

Thus, this order of Armijo, conceding its genuineness and presuming it to be referable to a desire to comply with law, was an order for a merely provisional possession of the land, made in advance of the time when it could "legally" and "regularly" be made. Now, is such an order a title such as claimants would have had a lawful right to make perfect had the territory not been acquired by the United States? Under the authorities above cited, the only method by which a claimant, during the Mexican rule, could perfect his title was to secure the approval of the assembly. But had he then any lawful *right* to that approval? Could he, as a matter of right, not of *grace* (Ainsa Case, *supra*), have demanded an approval by the departmental assembly? Could he have demanded such an approval as "an absolute right?" (Santa Fe Case, *supra*). Was the departmental assembly bound to perfect his title? Did the departmental assembly have no discretion in the matter? All these questions must be answered in the affirmative to bring the claim within the jurisdiction of the Court of Private Land Claims; and yet it is respectfully submitted that

under the law above cited all these questions must be answered in the negative. The submission of the concession when made by the governor to the assembly was no perfunctory matter; it was a part of a system by which the judgment of two separate and distinct authorities passed upon the propriety of the grant. If, by the same reasons which secured the favor of the governor, the petitioner was enabled to secure the favor of the assembly, all well and good; he secured his title. But if in the exercise of the unlimited discretion confided to the assembly—a discretion as wide as that of the governor when acting in the first instance—that body decided he was not entitled to the grant, he was at liberty to present the matter to the Supreme Government, and if that tribunal, in the exercise of its unlimited discretion, declined to make him the grant, all his rights, his equities, if you please, under the concession of the governor ceased and he was as devoid of title as if he had never petitioned for a grant and had never held possession of the property provisionally, pending final determination of his title. There is not a shadow of foundation in the regulations of 1828, or in the decisions of this court construing those regulations, for a contention that there was any legal obligation on the part of either the assembly or the Supreme Government to give its approval.

As was said by Judge Hoffman in the *Cervantes Case* (1 Hoff., 10, 11 *supra*):

> The deputation possessed not merely a qualified right to take from a petitioner land already absolutely granted to him, but it was the right to say *whether or not the land should be granted to him at all;*

and in the *Reading Case* (18 How., 7 *supra*):

> The latter [the grantee] might very well, after that had been done by the governor, *solicit the approval* of the assembly personally, or by an agent, by all those considerations which had gained him the governor's favor.

In the case of *Bouldin et al.* v. *Phelps* (12 Sawyer, 308), the court, through Judge Sawyer, after discussing the provisions of sections 5 and 8 of the regulations of 1828, says:

> Until these proceedings the title is not definitive, complete, or perfect, but remains inchoate and subject to be defeated. In this case there was no approval by the departmental assembly. The grant was never referred to it, and it never had any opportunity to *express its assent or dissent.*

In the *Roland Case* (7 Wall., 746), the supervisory power set forth in sections 5 and 8 of the regulations of 1828 is referred to by this court as "a *corrective applied* by the departmental assembly when the governor exceeded his authority."

In the *Hartnell Case* (22 How., 289), above referred to, the assembly did exercise this "corrective" by reducing a grant made by the governor from 11 to 6 leagues. In that case, in speaking of the power of the assembly and its uncontrolled discretion, this court says:

> It follows that the assembly *was the controlling power and could* reform or nullify the governor's grant.

In the *Vigil Case* (13 Wall., 450) this court says that in respect to grants the departmental assembly "was an advisory body to the governor and sustained the same relation to him that the *Senate of the United States does*

to the President in the matter of appointments and treaties." To contend that the Mexican grantee had a *right* to demand an approval by the assembly is therefore to contend that an appointee of the President has a *right* to demand a confirmation of his appointment by the United States Senate, and that the representatives of a foreign nation have a *right* to demand the approval by the Senate of a treaty negotiated between them and the Executive, a most unheard-of construction of paragraph 2, section 2, article 2, of the Constitution.

In this case, so far from there being any legal obligation on the part of the assembly to approve, there was not even a moral or equitable obligation to approve. The proof of possession under Armijo's permit to occupy is, as will be pointed out hereinafter, most vague and unsatisfactory; but assuming, in spite of the absence of satisfactory testimony to that effect, that the grantee remained in possession of the property from June 8, 1846, until the flight of Armijo and the occupation of the city of Santa Fe by the Americans in August, 1846—about two months—that state of facts would not, under decisions of this court, create any substantial equity. Thus, in the *Peralta Case* (3 Wall., 434) possession for a year before the conquest of the country was held to be "too limited to raise any substantial equity."

Further, even analogizing the length of time to give grantee a ground to ask patent to that required under the Spanish law, occupancy of four years was necessary (2 White, 49), a period much in excess of that which elapsed from the date of this grant to the American occupation, in August, 1846, or even to the date of the treaty of

Guadalupe Hidalgo, which was signed on February 2, 1848.

But even had the possession under the concession been for a great length of time before the American occupation instead of only a few months, the assembly and the Supreme Government would have been under no legal obligation to give an approval and the claimant possessed of no legal right to demand it. Under section 13 of the act of 1891, as construed by this court, however, it is the *legal* right to demand and *legal* obligation to give an approval that furnishes the test of jurisdiction.

Had the assembly approved, it would have done so as a matter of grace. But under the act of 1891 and the decisions of this court the jurisdiction depends upon a title perfectible by right and not by grace. "The act of 1891 excludes by express terms any claim the completion of which depended upon a mere grace or favor of the Government of Spain or Mexico and of the United States as the successor to the rights of these Governments." (*Santa Fe Case*, 165 U. S., 716.)

The matter of perfecting the title when submitted to the assembly was subject to its uncontrolled discretion, and since the treaty the matter of perfecting the title is within the uncontrolled discretion of Congress. But under the decisions of this court "an inchoate claim which was subject to the uncontrolled discretion of Congress is clearly not within the purview of the act of March 3, 1891." (*Santa Fe Case*, 165 U. S., 714–716.)

The Court of Private Land Claims found this to be "an imperfect title or right." (R., 147.) But under the

decisions of this court, especially that just quoted, "the duty of protecting such *imperfect* rights of property rests upon the political department of the Government;" and in the *Sandoval Case* (167 U. S.) it is said: "It is for the political department to deal with the *equitable* rights involved."

It is no argument against the contentions herein made to say that many concessions unapproved by the departmental assembly were confirmed under the California act. This court has, in the recent cases appealed from the Court of Private Land Claims, dealt with considerable emphasis upon the marked difference between that act and the act of 1891. Under the former "*any right* or *title* derived from the Spanish or Mexican Government" (9 Stats. at Large, 632, § 8) was cognizable, a statement of jurisdiction broad enough to include inchoate, imperfect, and equitable titles, as well as those which were perfect and complete at the date of the treaty.

An even casual reading of section 13 of the act of 1891 will show, however, the greatly restricted jurisdiction of the Court of Private Land Claims as compared with that of the California commission. The error into which claimants in this case and many others have fallen in presenting their claims is the assumption that the Court of Private Land Claims is invested with plenary power to recognize and to discharge all obligations imposed by the treaty of Guadalupe Hidalgo, whereas no principle is better settled than that the fulfilling of such obligations belongs to the political and not to the judicial department of the Government, and that courts can exercise jurisdiction to the extent only that Congress has

vested them with authority to determine and protect such rights.

The great difference between the acts of 1851 and 1891 must be ascribable largely to the experience of this Government in the litigation under the act first named. Scores of claims were presented for valuable lands in California with no foundation but an order of the governor, in many cases antedated. Perjured witnesses proved possession, and raised so-called equities; where possession could not be proved, Indian hostilities sufficient to excuse nonperformance of conditions were shown; the order of a governor made in the very last days of the Mexican régime with the greatest of haste and without subsequent submission to or consideration by the assembly were produced from private hands as a "right or title" giving the petitioner scores of thousands of acres of public domain. The courts used their best endeavors to discriminate between fraudulent and *bona fide* titles, but under the very broad terms of the act of 1851 many inchoate rights were ripened into patents, where there is every reason to believe that had there been no change of sovereignty the Mexican Government would never have recognized or perfected such titles.

To guard against such devastation of what under the former government would have been, and thus under the present government should be, public domain, Congress has in the act of 1891 restricted the powers of the court to the confirmation of claims held under the former government under rights equivalent, in our land system, to patents; or under rights such that parties were entitled

to patent from the former government. An instance of this latter class is found in sales by the Mexican Government of its land. In many of these cases the purchase price was paid, but the final titles were not issued. In many such cases the grantee had a right to demand his patent from the former government, and the court of private land claims has the power, under the act of 1891, and acting on behalf of the American nation, to do for him and for his successors in title what he could have demanded as a matter of right from the former government. But the question of recognizing inchoate and incomplete titles, depending for their completion on the favor of the former government, Congress has reserved for its own determination. The wisdom of this discrimination is most forcibly illustrated in the present case. The grant in question, if genuine, was made to an insignificant citizen, who, so far as shown, deserved no special favor from the Mexican Government, and yet who, it is now claimed, became by one stroke of the governor's pen—and when the drum beats of General Kearney's army could almost be heard at the outposts of the department—the owner in fee of over a hundred thousand acres of valuable land within a few miles of the departmental capital.

The claim here presented is *par nobile fratrum* with the worst of Pico's "eleventh hour grants" in California. Congress evidently was of opinion that the equities in such claims could be satisfied by much less than the amount of land mentioned in the inchoate title papers, and as it had uncontrolled discretion in matters of this

kind it preferred in shaping this act of 1891 to reserve the exercise of that discretion to itself rather than delegate it to a judicial body where it must necessarily be administered under rigid rules of law and with consequent inflexibility. Claimants in this case have ample redress in the privilege afforded them of presenting their claim to Congress. Perhaps that tribunal will conclude, just as the assembly or the supreme government of Mexico might have done had the flag not changed, that the equities of the claim presented by Ortiz will be satisfied by a confirmation to him of much less than the 115,000 acres he claims, or the 11 square leagues given him by the Court of Private Land Claims.

III.

Assuming that the governor had power in 1846 to make a grant under the colonization laws of August 18, 1824, and the regulations of November 21, 1828, the proof is insufficient to sustain this claim under the decisions of this court in the California cases, said regulations and the Mexican law not having been complied with in any substantial particular.

The regulations of 1828 were repeatedly considered by this court in the California cases, and the absence of a substantial compliance with their requirements resulted in the rejection of a large number of the claims presented under the act of 1851. This was especially true as to cases in which there was reason to suspect the *bona fides* of the claim or the genuineness of the muniments of title. It is to be presumed that the governor of a department

of the Mexican Government, especially one with the wide experience possessed by Pico in California and Armijo in New Mexico, knew the laws of his Government; and the fact that a title paper purporting to have been signed by him is issued with absolute disregard of the law under which it is alleged to have been initiated, necessarily raised a presumption against its genuineness that is strengthened by every additional item of violation of law.

Thus, while a failure to observe some of those requirements is not necessarily fatal, where, as in the *Hornsby Case* (10 Wall., 224), the title is confessedly genuine and *bona fide*, such failure in cases where the title is tainted with suspicion and its genuineness a matter of controversy is a most powerful consideration in aiding to attain the truth. The evidence in the record bearing directly on the fraudulent character of the grant paper presented will be considered under Point IV; but it is desired under the present heading to call the court's attention to the presumptions arising from the failure to comply with the minor requirements of the regulations of 1828, as well as to consider other and more serious omissions to comply with those regulations—omissions which, under the decisions of the California cases, would be fatal to complainants' case were there nothing else to be urged against it.

A reference to the regulations of 1828 will show that the power of the political chiefs (sec. 1) was to grant the public lands to private persons who may apply for them for the purpose of cultivating them or living upon them. This power, however, was to be exercised under

"the conditions that will hereafter be stated," i. e., the conditions set forth in the remaining paragraphs of the regulations. Thus the exercise of the power of the governor to make a concession of land was valid only when in accordance with these regulations. As was said by this court in the *Fuentes Case* (22 How., 443):

> The act of 1824 and the regulations of 1828 are *limitations* upon the power of the governor to make grants of land.

Under section 2 of the regulations the petitioner was required, in the first place, to apply to the political chief or governor with an application in which is to be given his name, country, and profession. A reference to the petition in this case will show that this was done only in part, there being no statement of the profession or business of the petitioner, such as would enable the governor to decide whether he was a fit person to take land for cultivation or residence. The petitioner was required under section 2 to accompany his petition by a map or diseño of the land asked for. There is no pretense that this was done in the present case. Under section 3 it was the duty of the political chief to proceed immediately "to obtain the necessary information as to whether or not the conditions required by the law of August 18, 1824, both as regards the land and the applicant, are found in the application." This under the California practice was called "securing an *informe*." There is no pretense here that this was done by the governor.

By the same paragraph he was required to hear the respective municipal authority as to whether or not any objection is found to the grant. There is no pretense

that this was done. On the contrary, if the testimony of Ramon Sena, a witness for claimants, is to be believed (R., 70), Governor Armijo promptly on presentation of the petition, without any showing as to the character of the petitioner, without any map showing the location of the land, without any investigation as to the propriety of making the grant, without calling on the municipal authorities or others to ascertain whether the property was "public land"—the only class of land which under section 2 he was authorized to grant—without looking into the amount of land asked for, without investigating the earlier grant alleged to have been made to Gaspar Ortiz y Pais and covered by the claim now made (R., 79, and map opposite)—this Governor Armijo, according to Ramon Sena, violated every duty connected with the matter in hand and promptly on presentation of the petition gave away to an insignificant citizen 115,200 acres of the public domain, an amount nearly 70,000 acres in excess of the 11 leagues allowed by the law of 1824. It is proper to state here that the representatives of the Government in this case believe every material statement in the testimony of Sena to be false, a matter which will be considered under the next heading. But the fact that in order to believe his testimony we must impute to the head of the department of New Mexico a most unusual degree of haste in alienating the public domain and an utter disregard of the law he was pledged to uphold in his administration is a sufficient ground for impugning the verity of the whole proceeding.

The facts as developed by the record are in a marked degree similar to those considered by the court in the

Roland Case (7 Wall, 746), where a grant alleged to have been made by Governor Pico on May 2, 1846, was rejected as fraudulent and spurious, the reasons moving the court being in part set out as follows:

> The *haste and recklessness*, to use no harsh term, with which this grant was made *can not but suggest grave doubts* of the *bona fides* of the transaction. It *nowhere appears that Roland had any claim on the bounty of the Mexican nation* or *ability or intention* to occupy *so large a tract of country;* and yet Pico near the time when power passed from his hands, *in the midst of civil commotion, disregarding the customary and established modes of making concessions* of the public domain to meritorious persons without an *informe*, without a *map*, without *any inquiry whatever*, grants to him eleven leagues of land.

In this case the usurpation alleged is even more marked, since the land claimed is *over* twice 11 leagues, the amount the law permitted to be granted.

This court in the *Teschmaker case* (22 How. 392) refers at length to the preliminaries necessary under the regulations of 1828, mentioning "the petition, marginal reference for a report as to the situation and condition of the land, report of the proper officers, and minute of concession," and adds:

> *Where none of the preliminary steps required* by the act of 1824 and the regulations of 1828 has been observed or shown as there required, and *but slight evidence of possession*, either as to value or permanency, the proof of the genuineness of the official signatures to the grant is *not sufficient*. Evidence under the circumstances of grants in California should be given so as to make the antedating of the

grant irreconcilable with the weight of the proof; otherwise there can be no protection against imposition and fraud.

In the *Cambuston Case* (20 How., 59) the court outlines the regulations of 1828 as providing: (1) That the governors may make grants to persons who ask for them for purpose of cultivation and inhabiting same; (2) petitioner shall address a petition giving name, country, and religion, and describing lands by means of a map; (3) governor shall institute inquiry as to the propriety of the grant; (4) shall then accede or not in conformity to the law; (5) definitive grant asked for being made, a document signed by the governor shall be given to serve as a title; (6) the necessary record shall be kept in a *book* provided for that purpose, etc. The court calls attention to the fact that not "one of the preliminary steps made requisite under the law of 1824 and the regulations of 1828 to a grant of the public domain by the governors has been observed," * * * and adds: "We do not see how they can well be dispensed with, as they are not only expressly prescribed by the regulations as essential to guard against improvident grants, *but constitute an essential part of the record of the title*."

The court goes on to say that it is not sufficient to satisfy these defects that the grant recites a compliance with the law. This must be shown when brought into question; there are no presumptions in favor of grants made under the law of 1824 and the regulations of 1828.

In the case of *Knight's Administrator* (1 Black, 228), the court held the claim to be fraudulent and antedated,

among the considerations leading up to the conclusion being the following:

> When complete, an *expediente* usually consists of the petition, with the diseño annexed; a marginal decree approving the petition; the order of reference to the proper officer for information; the report of that officer in conformity to the order; the decree of concession, and a copy or a duplicate of the grant. These several papers—that is, the petition, with the diseño annexed, the order of reference, the *informe*, the decree of concession, and the copy of the grant appended together, in the order mentioned—constitute a complete *expediente* within the meaning of the Mexican law. Three defects are obvious in the document exhibited in the record. There is no map annexed to the petition, and there is neither an order of reference nor an *informe;* and the inference from the fact that the decree of concession immediately follows the petition is a reasonable one that no orde of reference or report were ever made.

It is true that a failure to comply with some of the preliminaries above referred to does not necessarily invalidate the claim presented, and this is all that is held in the case of Hornsby (10 Wall., 224), often cited *contra.* In that case it is held that the governor had the power to dispense with the performance of some of these preliminaries, and that where the proof was otherwise satisfactory as to the *bona fides* and genuineness of the grant, and there was a substantial compliance with the more important provisions of the regulations of 1828, such claims were entitled to confirmation under the act of 1851. It is to be suggested, however, in connection with the Hornsby decision, that in that case the attorney for

the United States *admitted in writing* that the grant was issued by Governor Pico on the date it purports to have been issued, and there was archive evidence of its existence. This distinguishes that case from the cases just cited and from the case at bar. In these last, where the genuineness and *bona fides* of the transaction were and are directly attacked, the absence of *informe*, *diseño*, etc., constitutes evidence of lack of genuineness; whereas in the Hornsby Case there was no necessity or room for inference on the subject in the face of the Government's written admission of genuineness. In a case such as that under consideration, however, where *bona fides* is not only not admitted, but is most confidently denied, such omissions are badges of fraud that most strongly corroborate the Government's contention as to the illegitimate origin of the title. This distinction between the two classes of cases is pointed out in the Hornsby Case itself, page 241.

While the defects in the preliminary proceedings just pointed out go merely to the genuineness of the grant, the further defects in the proof of this claim, when tested by the regulations of 1828, not only corroborate the contention of the lack of genuineness in the title, but also entirely bar its confirmation.

The fact that the grant is alleged to have been made at the very last of Governor Armijo's official career, and nearly a month after Congress had recognized a state of war as existing between Mexico and the United States, and that the only direct evidence in support of the genuineness of the title, as will be more fully discussed under the next heading, is the testimony of two officials

of the former Government, sons-in-law of the alleged grantee—these, and other circumstances which will presently be pointed out bring the claim clearly within the reason and the letter of the rule fixed by this court in the California cases, that no claim originating under the Mexican Government is to be confirmed unless there be archive evidence of its existence, and unless a record of the grant has been made as required by section 8 of the regulations of 1828. If the California claims were such as to demand the announcement and enforcement of this rule, much more so does the present case upon the facts produced in the record.

That there is no archive evidence of this grant and that there was no record of the same under the former government can not be denied in the face of the record. There was no effort on the part of the claimants to produce the *expediente* from the archives or to furnish any archive evidence whatever of the fact that the grant was made. The only muniments produced are those already referred to, which were presented (R., 75) to the surveyor-general of New Mexico from the private custody of the claimants. That such a paper from such a custody, without archive corroboration, is not entitled to recognition is settled beyond controversy by the decisions of this court in the California cases hereinafter cited. There was no attempt on the part of the claimants to show that the *expediente* of this grant had ever been in the archives, or that, if formerly there, it had been lost. There was nothing to show that a corresponding entry of the application presented and a grant made had been made in a book intended for that purpose. In the absence of proof

it must be concluded that no such *expediente* exists or existed in the archives and no such record was ever made. This conclusion is corroborated by the fact that in what is known as the "Vigil index," completed in 1851, constituting a part of the records in the office of the surveyor-general and purporting to be "a general index of all documents of the Governments of Spain and Mexico up to the year 1846," there is no mention of this grant. This index in a certain sense corresponds to the Hartnell index, so frequently referred to in the California cases. While it was not introduced in evidence in this case, it is believed that, as a record turned over to the surveyor-general on the establishment of his office in 1854 and now in his official custody, the court will take judicial notice of its contents. It is referred to on the last page of the printed transcript of the trial in the case of *May Hays* v. *United States*, on appeal to this court, being No. 19, October term, 1899, set for hearing with this case. The certificate of Special Agent W. M. Tipton, attached to this brief as appendix No. 2, shows that upon a very careful examination of that index there is to be found no reference to this grant. Out of an abundance of caution, however, the original of that index, certified up from the surveyor-general of New Mexico, has been placed with the clerk of this court. If its formal introduction in evidence is essential to its consideration by this court, it is here and now tendered in evidence by the Government under section 9 of the act of March 3, 1891, empowering this court to "cause testimony to be taken in addition to that given in the court below." As pointed out in *Coe* v. *United States* (155 U. S., 83), this

court probably has power, even independent of section 9, just cited, to receive new evidence on appeal.

The bare question now presented therefore is, whether, under the Mexican law and the decisions of this court thereon, a grant document of the character here presented, produced, under the circumstances shown in the record, from private custody, unsupported by archive evidence, with no record of it made under the former government, and with no note of it found in an index of the archives of the former government, completed three years after the treaty—whether such a document constitutes sufficient foundation to entitle a claim to confirmation. It is believed that the following cases conclusively settle the question in the negative.

In the *Fuentes Case* (22 How., 443) the facts were in many respects similar to those found in this record. The title paper presented, like that in this case, was from the possession of the grantee. Of this the court says:

> It [the paper] has no connection with the preliminary steps required by the act of Mexico of August, 1824, or with the regulations of November, 1828. It is deficient in every particular, unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer for a report upon the case; no transmission of the grant—supposing it to be such—to the departmental assembly or Territorial legislature for its acquiescence; nor was an *expediente on file* in relation to it, accord-

ing to the usages in such cases. All the foregoing were customary requirements for granting lands. Where they had not been complied with the title was not deemed to be complete for registration in the archives nor in a condition to be sent to the departmental assembly for its action upon the grant. The governor could not dispense with them with official propriety, nor shall it be presumed that he has done so because there may be, in a paper said to be a grant, a declaration that they had been observed, particularly in a case where the archives do not show any record of such a grant. The act of 1824 and the regulations of 1828 are *limitations* upon the power of the governor to make grants of land. They are and were also considered to be directions to petitioners for land before they could get titles. Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a *presumption arises against its genuineness*, making *it a proper subject of inquiry before that fact can be admitted*. It is not to be taken as a matter of course, *nor should slight testimony be allowed to remove the presumption*. Both the kind and quantum of the evidence must be regarded.

In announcing its conclusion rejecting the grant the court goes on to say:

> We have given to this case a very careful examination and have concluded that *no evidence can be found on its record to sustain* the genuineness of the paper under which the land is claimed; that there is none to prove its registry in the archives of the secretary's office, at the time of its date or afterwards; that no reliable proof has been given to connect it with the book of records which had been committed to the care of the witness, Folsom, and

> was burned in his office; that it does not appear that any one of the precautionary requirements, before a grant could be made by a governor of California, had been complied with in this case; that there is no proof whatever that such a paper as that in question had been delivered to the claimant at any time before the power of Mexico in California had ceased; and it was admitted in the argument of the case here that no such paper had been sent to the departmental assembly for its acquiescence as a grant from the governor.

The *Luco Case* (23 How., 515) is very similar to this. In that case the attorney for the United States argued lack of genuineness, based upon the following, among other facts: (1) The grant was for about 60 leagues, whereas the granting power of the governor was restricted to 11 leagues; (2) no *expediente* of grant exists in the archives, where it certainly would have been at one time had the grant been genuine; (3) there is no minute or entry of the grant in the book of Toma de Razon for the corresponding year. The court rejected the grant for the reason, among others, that the grant is not found among the archives, nor is it registered, and in so doing announces the following rule of decision:

> It may be received as a general rule of decision that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, *unless it be found noted in the archives*, or *the expediente or some part of it be found on file among the archives where other and genuine grants of the same year are found*, and that owing to the *weakness of memory with regard to the dates of grants signed by them the*

testimony of the late officers of that government can not be received to supply or contradict the public records or establish a title of which there is no trace to be found in the public archives.

This rule is quoted and followed in the *Palmer Case* (24 How., 128), where it is remarked "that it is easy to obtain any number of witnesses to depose to any fact necessary to establish a fraudulent grant." Both of these cases are most pertinent to the present inquiry when it is recalled that the two witnesses relied upon to establish the material facts of the cases were both sons-in-law of the alleged grantee and brothers-in-law of the petitioner before the surveyor-general. The motives of human interest that led witnesses in California, from Pico, the governor, and Moreno, the secretary, down, to attempt to swear paupers into possession of principalities were not entirely absent in New Mexico when this claim was being heard by the surveyor-general, and are not entirely absent now.

Resuming the examination of the authorities in the *Teschmaker Case* (22 How., 405), it is said:

> The nonproduction of this record evidence of the title under the circumstances is calculated to excite well-grounded suspicions as to its validity and throws upon the claimants the burden of *producing the fullest proof of which the party is capable of the genuineness of the grant.* We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or *its absence accounted for to the satisfaction of the court.*

The *Pico Case* (22 How., 406) was reversed and remanded because of a similar defect in the proofs.

The *Bolton Case* (23 How., 347) holds that the record required in the regulations of 1828 is "the *evidence* of grant," and that while the *titulo* given by the governor "serves, among individuals, the purpose of evidence," the Government when it institutes inquiries in reference to the subject is "entitled to require the production of that official record which it has prescribed to its officer, for its own security and as a necessary condition of a legal administration and a necessary precaution against fraud."

The rule is stated thus in the *Castro Case* (24 How., 346):

> As a general rule, in order to support a title to land in California under a Mexican grant, the *written evidence of the grant* in the form required by the Mexican law *must be found in the public* archives and records where they were required by law and regulations to be deposited and recorded. In order to support a title by secondary evidence the claimant must show that these title papers *had been deposited and recorded in the proper office;* that the records and papers of that office, or some of them, had been lost or destroyed, and also that he entered into the possession of the premises and exercised authority as owner within a reasonable time after the date of the grant. The possession is an essential part of the secondary evidence of title. *Parol proof of a grant produced from a private receptacle without proof that it had been deposited and recorded in the proper office* and the loss and destruction of papers in that office is not sufficient to support a title even if possession be proved by the oral testimony of witnesses.

The case of *Knight's Administrator* (1 Black, 228) is a leading one on this subject, the opinion of the court being in part as follows:

> But a more decisive answer to the claim remains to be stated, and that is *that there is no record evidence that the grant was ever issued, and without such evidence the claim can not be confirmed.* That rule is founded upon the Mexican law, and has been so repeatedly announced by this court that it seems unnecessary to adduce any argument in its support.

The court then quotes from the *Castro Case* (24 How., 350 *supra*), and adds:

> Evidence was also introduced by the claimant tending to show that a book of records appertaining to land titles in California for the year 1846 was lost, *but no attempt was made to show that the grant in question was ever recorded in that book.* * * * Proof of such a loss can not avail a party in a case like the present, unless it also be shown, at least by circumstances which will justify the court in finding the fact, that the *grant was duly and properly entered in the lost record.*

The strictness of the rule is illustrated by the last quotation, which shows that proof of loss of a record that *might* contain the grant is not sufficient, but that claimants must go further, and show that the grant in question was actually a part of that record.

The *Neleigh Case* (1 Black, 298) reiterates the rule as follows:

> A paper purporting to be a grant of land in California first produced from the custody of a claimant after the war and unsustained by any record evidence

will not be held valid by this court. * * * Evidence of the destruction of archives during the war does not avail the holder of such a naked grant, unless he can show *where* and *how the specific papers necessary to complete his title were lost or destroyed.* * * * The court again affirms the doctrine *that the testimony of Mexican officials can not be received to supply or contradict the public* records. * * * The theory of claimants has been that the want of archive evidence should be excused on the ground that many of the records were lost or destroyed; but the records of the Mexican Government in California being found in tolerable preservation and the most enormous frauds having been attempted on the assumption that this theory would account for their nonproduction, the court has been compelled to reject it as altogether fabulous. * * * A *grant not recorded* and *for which no expediente is found* and which is not among the forty-five sent to the departmental assembly and confirmed on the 8th of June, 1846, *can not be believed genuine on the testimony of a Mexican secretary*, who swears that he signed and delivered it.

So in the *Romero Case* (1 Wall., 743) it is said:

Taken separately, the parol evidence, if competent, might possibly justify a different conclusion, but it is clear that it must be weighed in connection with the documentary evidence, and when so considered the conclusion is irresistible that no grant was ever issued by the governor. Suppose it be conceded, however, that the probative force of the parol testimony is not overcome by the contrary tendency of the written evidence, the concession could not benefit the claimants, *because the case is one where there is no record evidence of any kind* to prove either

the existence or the authenticity of the grant. Assuming that state of the case, then it falls directly within the class of cases where the confirmation has been refused, because there was no record evidence to support the claim (citing numerous cases).

In the *Vallejo Case* (1 Black, 541) the court, referring to the regulations of 1828, says:

> It is sufficient to say, that the system thus established by the sovereign power of the nation for the grant and distribution of the public lands, exhibits a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our Government and furnishes the highest evidence *of the extreme interest the Mexican Government* took in guarding against impositions and frauds, by or upon the political chiefs in the execution of the law. * * * No record was made of the title. * * * It was well said in *United States* v. *Sutter* (21 How., 175) that "in every well regulated government the deeds of its officers conveying parts of the public domain are *registered or enrolled*, to furnish permanent evidence to its grantees of the origin of their title." * * * It is important, also, that a record should be made of these grants, so that the Government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description when made in due and orderly form are either made at the seat of the government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, *are not deemed grants till the proper record is made.*

In the *White Case* (1 Wall., 660) the documentary evidence was quite full, consisting of petition, marginal order of reference, *informe* and decree of concession, and map, all, however, from *the custody of the claimant*. Governor Alvarado, who executed the grant, testified that *he executed and delivered it at the time it bears date;* other witnesses testified to having seen the grant at an early date, also as to the grantee's claim under the same at an early date, and as to his possession under the same. A witness also testified that he wrote Ortega's petition for him and made the very map exhibited in the case. There was other strong evidence for the claimants and the evidence for the United States was purely inferential. This made a much stronger case for claimants than is shown by the present record, and yet the Supreme Court says, in rejecting the claim:

> It has been held by this court in a long and unbroken line of adjudications that where there is no *archive evidence and its absence is unaccounted for* and there has been no such possession as raises an equity in behalf of the party, and especially where, in addition, the *expediente* produced is tainted with suspicions of fraud, the claim must be rejected. We feel no disposition to relax the rule and it is fatal to the case of the applicant.

In the *Pico Case* (2 Wall., 281) the opinion of the court, delivered by Mr. Justice Field, contains an instructive discussion of the necessity of record evidence. This is in part as follows:

> The regulations of 1828, which were adopted to carry into effect the colonization law of 1824, presented with great particularity the manner in which

portions of the public domain of Mexico might be granted to private persons for the purposes of residence and cultivation. * * * All of them, from the petition of the colonist or settler to the concession of the governor, were required to be in writing, and when the concession was made to be forwarded to the departmental assembly for its consideration. * * * The approval of the assembly was essential to the *definitive validity of the concession*, and when obtained a formal grant was issued by the governor to the petitioner. The regulations contemplated an *approval to precede the issue of the* formal grant, so when the grantee received this document the concession should be considered final. For a long time after the adoption of the regulations this course of proceeding was followed; but *afterwards*, and some years previous to the conquest, a different practice prevailed, and the *formal titles were issued without waiting for the action of the assembly*, a clause being inserted to the effect that the grant was subject to the approval of this body. Of the petitions presented and grants issued, *whether before or after the approval of the assembly*, a record was required to be kept in suitable books provided for that purpose. * * * As will be perceived from this statement, it was an essential part of the system of Mexico to preserve full record evidence of all grants of the public domain and of the various proceedings by which they were obtained. When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican Government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, *a strong presumption naturally arises against the validity of the*

> *instrument* produced, which can only be overcome, if at all, by the *clearest proof* of its genuineness, accompanied by open and continuous possession of the parties.

The case of *Berreyesa* v. *United States*, decided by this court and found in 23 Lawyers' Cooperative Edition 913, goes still further and holds that a Mexican grant *will be rejected* where it does not appear that it "has been deposited and recorded in the proper public office among the public archives of the Republic."

Perhaps the latest case on the subject is that of *Peralta* (3 Wall., 434). In that case the documentary evidence was quite complete, much more so than in the case now under consideration, and yet the court holds:

> There was neither grant nor archive evidence. If there had been a grant according to law the *expediente* would have remained in the archives, but there is no trace of it there, and it is produced from *private hands, which tends strongly to show that the governor never saw it.*

Speaking of the California act, the decisions of this court thereon, and the policy of the Mexican nation as to a permanent record of grants of its domain, the court says:

> Very many claims were tested by the rules and found to be valid and were confirmed; others were imperfect and could not be recognized. Then commenced a struggle which has never been abandoned, to induce the courts to fritter away the act of Congress and *substitute parol proof for record evidence.* The history of the cases in this court from California show the extent of the struggle and the result. We have refused to allow oral testimony

> to prevail where archive evidence was necessary. * * * The Mexican nation attached a great deal of form to the disposition of its lands and require many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. *The record was the grant and without it the title was not divested.* The governor was required to give a document to the party interested, which was evidence of title and enabled him to get possession; but this "*titulo*" *did not divest the title unless record was made in conformity with law. Written documentary evidence, no matter how formal and complete or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed.*

The court goes on to say in regard to the contention that the party in interest should not suffer where the archives have been lost or destroyed:

> This is true, and if the claimant can show to the satisfaction of the court *that the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed*, he will be permitted to introduce secondary evidence of it. *But the absence of record evidence is necessarily fatal*, unless that absence can be accounted for.

Under the authority just cited, which is the last of a long line of cases, and is thus the mature and final judgment of this court upon a subject with which it has had

to deal repeatedly, the record *was* the grant, and without it the title was not divested. No matter how formal and complete the documentary evidence, or how well supported by oral testimony, the title is insufficient if produced from private hands and there is nothing in the archives to corroborate it. This statement of the law is conclusive of the present case, a case that has not only the radical defect of being founded upon a paper from private hands and without archive record or corroboration, but a paper most informal and incomplete, issued without regard to the law under which it claims its right to exist, and unsupported in any substantial particular save by the most incredible of oral testimony. It is confidently submitted that if there were no other objection to this claim its absolute lack of archive corroboration is sufficient to necessitate its rejection.

IV.

The muniments of title under which this grant is claimed are shown to be spurious.

Under the last heading there has been discussed the effect of an absence of compliance in the title papers with the law of 1824 and the regulations of 1828. As above argued, the effect of a noncompliance with some of these regulations is absolutely to debar a confirmation, and the fact that the title papers show no compliance with other and minor regulations raises a presumption against the claim. We enter, therefore, upon a discussion of the evidence directly bearing upon the genuineness of the grant papers, with those papers already discredited and impeached by their internal deficiencies. As was said in

the Fuentes Case, in the lack of a compliance by the grant with the law, "a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted." That case goes on further to say that "it [the genuineness of the grant] is not to be taken as a matter of course, nor should slight testimony be allowed to remove the presumption." In the Pico Case, as above pointed out, in the absence of archive evidence, according to the most lenient view taken by this court, "a strong presumption naturally arises against the validity of the instrument produced, which can be overcome, if at all, only by the clearest proof of its genuineness." We come, therefore, to the branch of the subject—that in which the *fact* of genuineness is to be discussed—with "a presumption against the genuineness of the grant"—"a strong presumption." Claimants, therefore, are not only under the necessity of proving their case, since they hold the affirmative of the issue, but must go further, and at the very outset and "by the clearest proof" rebut a presumption of fraud arising from their own proofs. That they have not only not rebutted the unfavorable presumption arising from the character of their proof, but have even failed to make out their case in the first instance, independent of these presumptions, is, it is respectfully submitted, clearly shown by the record.

A preliminary consideration in connection with the genuineness of the title papers is the fact that the grant is not on stamped paper. The recent adoption under our own Government of a revenue system based in part upon the stamping of documents is somewhat illustrative

of the importance attached to the similar system under the Government of Mexico. Under that Government, where the sources of revenue were much fewer and scanter than with the United States, the use of stamped paper as a tax measure was a matter that the authorities very jealously insisted upon. One of the laws bearing upon the use of such paper is found in Dublan and Lozano's Compiled Laws of Mexico, volume 4, page 155. Section 13 thereof is as follows:

> Every individual, who presents any document not drawn on the proper stamped paper, for the mere act, shall incur a fine of triple the value of the paper he should have used, replacing, besides, the proper sheets, which when canceled shall be aggregated to the document, without which requisite it shall not be acted upon nor have any effect.

This decree bears date April 29, 1842, and was in force at the date of this alleged grant. It shows that under the Mexican law the failure to use stamped paper in matters of this character subjected the offender to a fine, and that unless the document bore a stamp either primarily or subsequently affixed it "should not be acted upon *nor have any effect*." Its being stamped was thus essential to its validity. It is worthy of note that this is the only instrument purporting to be a grant under Mexico, filed before the surveyor-general of New Mexico under the act of 1854 or found in the archives of his office, bearing date subsequent to April 29, 1842, the date of said stamp law, that is not on stamped paper. The condition of these archives is, as above pointed out, a matter of judicial notice, and the result of an examination of these made

by Special Agent Tipton is given in Appendix No. 2, attached to this brief. The fact that the document was not on "habilitated paper" is given as a ground for rejecting the grant paper presented in *Boulden et al.* v. *Phelps.* (12 Sawy., 308, *supra*).

It is not to be presumed that the governor of a department would issue a title for over 100,000 acres of land as a pure gratuity and not even require the petitioner to pay the petty government tax imposed by law. It was his duty under the law to see that this tax was paid, and the fact that it was not paid is a most suspicious circumstance connected with the title and one that entirely accords with the theory of the Government, that this title paper was manufactured years after the American occupation, and at a time when it was impossible to secure stamped paper of the date necessary. It was doubtless to avoid the force of this very noticeable defect in the title papers that the originator of the grant document states therein (R., 73) that the petition is not on stamped paper, "there being none in this city;" and that Antonio Sena (p. 68), in response to a question that asks him absolutely nothing about the matter, volunteers the statement that "in the month of June, 1846, there was no stamped Government paper here and we had to use common paper." These statements might possess some force, but for the fact that they are shown by the archives to be absolutely false. For instance, archive 1143 is an instrument on stamped paper and is dated June 4, 1846, the very day upon which this petition is alleged to have been presented to the governor and the

grant made. This archive was introduced as "Defendant's Exhibit P—Tipton" (R., 47, 51), and the original is now in the custody of the clerk of this court.

Another fact in the record that bears against the genuineness of the title is the date at which it purports to have been made. This subject has hereinbefore been discussed in part, but it seems proper to add some further considerations.

The existence of war between Mexico and the United States having been recognized by Congress on May 13, 1846 (*Romero* v. *United States*, 1 Wall., 743), this title paper, which bears date June 4, was signed twenty-two days after formal hostilities were declared and at a time when, according to the testimony offered by claimants in explanation of the very extraordinary character of Governor Armijo's alleged signature (R., 70), he was "in a condition of excitement or nervousness" due to the approach of the American troops. In the *Cambuston Case* (20 How., 64), where the grant was made two weeks before this one, this court held as one of the considerations leading to a reversal of the decree confirming the grant the fact that it was "one purporting to have been made by Pico so near the time when the government of the territory had passed from his hands;" and this court then and there announced the rule that such a grant, and all others similarly situated, "should be inquired into and scrutinized with great care, both as to the authority of the governor to make them and the *bona fides* of its exercise, in order to prevent impositions and frauds."

This grant, it will be further noted, is dated nearly a month after May 13, 1846, subsequent to which date the

Mexican authorities who negotiated the treaty of Guadalupe Hidalgo declared no grants of land to have been issued in the territory ceded by the Mexican Government. The declaration in the negotiations that "no grant whatever of land in any of the territories aforesaid [Texas, California, and New Mexico] has been made since the 13th day of May, 1846" (Senate Document, first session Thirtieth Congress, vol. 7, for 1847–48, No. 52, p. 83) is of very persuasive weight in this case and sustains the Government's position in its attack upon these title papers. Here was a tribunal composed of men of standing, chosen by their nation to negotiate a treaty ceding to a foreign country a large portion of its domain. In negotiating that treaty, among the first duties to be performed by the Mexican commissioners was the insertion of a proper provision for the security of the property of Mexicans in the ceded territory. Certainly no higher duty rested upon them, nor one that they would naturally approach with greater caution. With the view to acting safely, it is to be presumed that they consulted the records of their own Government and the reports as to grants that Governor Armijo and other governors were required, under section 9 of the regulations of 1828, above quoted, to make quarterly to the supreme Government. It is not improbable that Armijo himself, in a matter of such great importance to his late people, was called upon to make a statement of the date down to which he exercised the power of making grants. As a historical fact Armijo was during this time actually in Mexico, a fugitive from the department over which he had so recently presided (see proclamation of General Kearney, dated

August 22, 1846; Ex. Doc. No. 60, p. 171, Thirtieth Congress, first session), and he was thus at hand, with every opportunity to give the commissioners personal information on the subject.

As was argued by counsel for the United States in the *Yorba Case* (1 Wall., 412):

> It [this declaration] is also entitled to credit because made by the party most interested in knowing, after examination, with the best sources of information within its reach and with opportunity, during the period of nearly two years to ascertain the truth of the fact.

And yet, after such examination, after two years' consideration and deliberation, after section 10 of the treaty which embodied this stipulation as a solemn agreement had been stricken out by the United States Senate because of other objectionable features, we find these Mexican commissioners reiterating their former statement when they say in the protocol signed at Querétaro on May 26, 1848:

> Legitimate titles to every description of property, personal or real, existing in the ceded territory are those which were *legitimate titles* under the Mexican law in California and New Mexico up to the 13th day of May, 1846.

It is true that this protocol was no part of the treaty of 1848, and it is further true that it has been held by this court in the Yorba Case, *supra*, that this statement by the commissioners does not affect the rights of parties who subsequent to May 13, 1846, obtained grants from the governors while their authority and jurisdiction continued. These proceedings, however, are not cited for

the purpose of showing that the grantee herein thereby lost his title, but for the purpose of showing that he never acquired any title.

Unless we are to believe that the Mexican commissioners acted without knowledge of the weighty subject which demanded their attention, we must attach importance to their assertion that no grant was made in New Mexico subsequent to May 13, 1846. If we are to accord to them the not over-liberal presumption that they knew what they were doing, we must accept their statement to this effect as evidence of what they discovered after investigation, and as evidence of the fact that upon such investigation they found no grant to have been made in New Mexico subsequent to that date. But, if this statement was and is true the Sierra Mosca title is not "legitimate," for it purports to have been made subsequent to that date. Of course it is possible that the commissioners were mistaken in this solemn stipulation. Such is the effect of the Yorba decision as to a grant made in California subsequent to May 13; but in the Yorba Case the proof was abundant that the grant was genuine; there was archive evidence of its execution and its *bona fides* was beyond question; and such might be the conclusion here were this a claim supported by proof such as was adduced in the Yorba Case. But here we have a paper irregular in its form, issued without compliance with legal requirements, supported by not a *scintilla* of archive evidence, covered with *indicia* of fraud, and, finally, issued twenty-two days after the date upon which the commissioners of Mexico state such muniments are entitled to be called legitimate.

In the supplemental brief for the United States in the case of *J. Francisco Chaves* v. *United States* (case No. 14, this term), there are pointed out the dates of grants made by the Mexican authorities from 1821 to the time of the American occupation. From that list it will be seen that the last title issued by Governor Armijo (save that here presented) was a grant to John Scolly and others, dated May 7, 1846, six days previous to the date mentioned in the protocol. It is a very peculiar coincidence that the only grant paper ever heard of as having been signed by Governor Armijo subsequent to May 13 is this suspicious Sierra Mosca title. This fact corroborates strongly the Government's contention that this paper is of most illegitimate parentage.

Another circumstance to be noted is the character of the person to whom this title is alleged to have been granted. It was not to a prominent citizen, one who deserved well of his nation or recites in his petition any special considerations that should appeal to its generosity. He was at the date of the alleged grant a resident of Pojuaque, a little village some miles north of the capital, and so far as the record develops, he was a man of only ordinary standing in his very small community. Subsequent to 1846 he was for years a mere clerk in his son's store in the city of Santa Fe (R. 20). It is incredible that the governor would to such a person make a princely donation of over 100,000 acres within a few miles of his capital. As was said in the *Cambuston Case* (20 How., 59):

> In the examination of the evidence in this case we have found it very difficult to resist a suspicion

as to the *bona fides* of the grant in question. It is a pure donation, made without pecuniary consideration or meritorious services rendered to the Government of Mexico.

If such suspicions were aroused in the case of a grant of 11 leagues of land, the amount donated in the Cambuston Case, they are infinitely stronger in the present case, where the gratuity was over twice that amount and for lands located as these were located.

The uncertainty of the custody from which this paper comes is also proof against its genuineness. There is no direct testimony showing from whose keeping this paper came. If it was ever in the possession of Juan Luis Ortiz or his heirs, there is nothing in the record to show it. Claimants sought to prove by one of their witnesses, Magdalena de Ortiz, the wife of Gaspar Ortiz y Alarid, who was a son of the alleged grantee, that the paper presented had formerly been in the possession of these parties, but the best answer they could secure from her (R., 14) was that the quality of the paper in the document shown her on the trial was "something like that" in a document seen by her in her husband's custody years before, an answer that could have been truthfully made had any other paper than the muniments of title been shown her. The only evidence on the subject in the record (p. 7) is that this paper was filed by claimants of this grant before the surveyor-general of New Mexico in 1872. Neither the names of the claimants who produced this paper nor the source from which they obtained it appears.

Assuming, however, as claimants contend, that it came

from the possession of the successors in interest of the alleged grantee, it was a paper which could not but improperly come from that custody. An inspection of the document will show that it purports to be an original petition, with an original marginal order of the governor, followed by an original of the act of possession. Such a document constitutes a part of what was called, under the Spanish and Mexican system, the *expediente*, and the proper custody of the *expediente* was the archives. Under both the Spanish and Mexican Governments the original proceedings were always retained in the archives, and a *testimonio* was given the party as his evidence of title. This was necessarily so, as otherwise the archives would be without record of the proceeding. An inspection of the regulations of 1828 will show that there was no provision for the delivery to the grantee of the title papers, nor of any document at all, until the delivery of the definite title mentioned in section 8. Certainly if any papers were to be delivered, they could not have been the original petition of the claimant with the marginal order of the governor thereon, those being the very papers that would have been preserved in the archives for future reference; and yet those are the very papers here produced from the custody of *claimants*. As was said by the attorney for the Government in discussing a case very similar to this (*Luco et al.* v. *United States*, 23 How., 528):

> No explanation is given of the fact that the claimants have produced from their own possession papers in the usual form of an *expediente*. They have no business to be there; if they were genuine they could not be there. It is where they would be

> if the contrivers of this case thought a manufactured *expediente* necessary to sustain a simulated grant.

This court, in deciding that claim to be invalid, gives as one of the reasons for concluding it not to have been executed at the time it bears date (p. 540), the fact "that the petition instead of being annexed to the *expediente* is found in the hands of claimants and not among the archives."

In the *Peralta Case* (3 Wall., 434, *supra*), it was said by the court:

> If there had been a grant according to law the *expediente* would have remained in the archives, but there is no trace of it there and it is produced from private hands, which tends *strongly to show that the governor never saw it.*

It is further to be noted that the genuineness of this title has always been a subject of suspicion. On the hearing in 1872, although there was no testimony impeaching its good faith, Surveyor-General Proudfit suspected its character on first acquaintance. Thus, in his report dated October 8, 1873 (R., 76), he says:

> I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth.

Mr. Proudfit does not enlighten us as to the reason for his suspicion, but it is not hard to conjecture the cause. There is about every fraudulent affair a certain indefinable odor of moral taint that appeals to the sensibilities of a conscientious official. Just as the credibility of a witness is determined by his general reputation for truth and veracity, and not by specific instances of wrong-

doing, so Mr. Proudfit, when he first made the acquaintance of this document, found it to be "of bad reputation."

It is true that subsequently, on an *ex parte* hearing, claimants seemed to have succeeded in removing these doubts from his mind; but the fact that they were there in the first instance, when no testimony whatever to discredit the title paper had been offered, shows that this claim came into his office and to his official attention with not the very best credentials of character. Subsequently, parties living at the very *locus in quo* of this grant, but claiming under another title, secured a rehearing of the cause before the surveyor-general, with the result that Surveyor-General Julian (R., 113) made a supplemental report, recommending its rejection by Congress as a forgery.

We come now to a discussion of the evidence offered by claimants in support of the genuineness of their grant. This was the testimony of four witnesses: Antonio Sena, Ramon Sena, Joab Houghton, and Pablo Dominguez (R., 67–71). The testimony of these four witnesses constitutes all the showing made by the claimants not only on the subject of genuineness, but also as to possession and on every other branch of the case, and if the testimony of these four witnesses be adjudged insufficient, the whole foundation of plaintiffs' claim crumbles away and the fabric must fall to the ground. It is to be noted that although the genuineness and *bona fides* of this claim was in issue before the surveyor-general for years prior to its presentation to the Court of Private Land Claims and was put in issue by the Government on the trial below, not a word of additional

testimony was offered by claimants on the trial below on any material point. It is true that claimants at that hearing presented the oral testimony of E. F. Sidebottom, Epifanio Vigil, Juan Cristobal Romero, and Magdalena de Ortiz, but this did not bear upon any matter in issue. Mr. Sidebottom, a clerk in the office of the surveyor-general, testified simply as to the custody of certain records. Mr. Vigil testified as to the death of certain witnesses so as to make their testimony taken before the surveyor-general admissible under section 5 of the act of 1891. Witness Romero testified as to the location of some of the natural objects mentioned in the title papers. The testimony of Magdalena de Ortiz is mainly hearsay, but it is believed that an examination of it (R., 13) will show absolutely no evidence in any way calculated to strengthen claimants' cause. On the contrary, so far as it is intelligible, admissible, or material, it is favorable to the Government, as will be hereinafter pointed out. This makes it necessary to consider, therefore, only the testimony of the four witnesses above mentioned examined before the surveyor-general in 1872, to wit, Antonio Sena, Ramon Sena, Joab Houghton, and Pablo Dominguez (R., 67–71).

The fact that this evidence, taken before a nonjudicial officer of the Government (*Astiazaran* v. *Santa Rita Company*, 148 U. S., 80; *Chaves* v. *Whitney*, 4 N. M., 611), was admissible at all, rests purely upon the provisions of section 5 of the act of March 3, 1891, which provides that "the testimony which has been heretofore lawfully and regularly received by the surveyor-general of the proper Territory or State, or by the Commissioner

of the General Land Office, upon any claims presented to them, respectively, shall be admitted in evidence in all trials under this act, when the person testifying is dead, so far as the subject-matter thereof is competent evidence; and the court shall give it such weight as in its judgment, under all the circumstances, it ought to have."

The last clause of this section is particularly noticeable, in that it gives the court the power to disregard such testimony altogether where, even if uncontradicted, it is not under all the circumstances in the judgment of the court entitled to any weight. This rather anomalous provision of the statute was doubtless inserted on account of the very peculiar circumstances under which most of the testimony was taken before the surveyor-general, under the act of 1854. That act (10 Stat. L., 309) made it the duty of the surveyor-general "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." He was for this purpose authorized to "issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises," and was thereupon required to "make a full report upon all such claims." It was not made the duty of the United States attorney to appear at such hearings, and there was no provision of statute by which attorneys for the Government were appointed to protect its rights. In many instances the surveyor-general was not a lawyer, and in most instances knew nothing about law. Claimants brought in witnesses; they gave their testimony. It was a very rare occurrence for any questions to be

asked by the surveyor-general, and where leading or otherwise illegal interrogations were propounded there was no officer of the Government to interpose an objection. The hearings were thus practically *ex parte* and the depositions of the witnesses in effect affidavits and nothing more. Under these circumstances the testimony given before the surveyor-general is not of a character such as to command the respect that would be entertained for testimony produced in a judicial tribunal in the presence of both parties, and with full opportunities for cross-examination.

It was doubtless in recognition of this fact that Congress provides in section 5 that this testimony is to be accorded by the court only that weight to which under all the circumstances it is entitled. Among these "circumstances" is the presence or absence of cross-examination on the hearing before the surveyor-general, the fairness of that hearing taken as a whole, and the probability of the truth having been arrived at by such an investigation as was had. It is believed that, tested by this rule, the manner of the taking of the testimony of these four witnesses entitles it to but little weight. A glance at the record will show that not a question on cross-examination was asked the three most important witnesses for claimants at the hearing. Mr. Houghton was asked three questions on cross-examination, two of them as to Governor Armijo's habits, but none of them throwing any light on the subject. In addition, an examination of that testimony will show that questions calling for direct or categorical answers were met by lengthy dissertations,

embodying not only the reply sought, but a quantity of matter not at all responsive. Any court in the world, on reading such an examination of witnesses—one in which they were allowed to testify at length without any attempt to test their knowledge and their veracity by cross-examination, and in which they were permitted to answer the questions propounded by claimants in the most irresponsive manner—would say that the Government's case had been permitted to go practically by default. To meet such cases as these Congress provided that the "circumstances" under which the testimony was taken should be considered by the court. It is respectfully submitted that the "circumstances" of the taking of this testimony before the surveyor-general condemns it to be adjudged, under the statute, of no weight.

Two of these four witnesses, Antonio Sena and Ramon Sena, testified directly to the signing of this paper by Armijo, while Judge Houghton and Pablo Dominguez give their opinion as to the handwriting.

Antonio Sena testifies (p. 67) that he resided in Santa Fe in June, 1846, being prefect of the first district of New Mexico. He stated that he had seen Armijo and Juan Bautista Vigil write frequently, and that their signatures were genuine. He further testified that Jose Dolores Trujillo, who purports to have given juridical possession, was justice of the peace at Pojuaque, and that he (Sena), as prefect, appointed him. That this is not true will clearly appear from an examination of the evidence. From the record it will be seen that in each demarcation there was an alcalde or justice of the peace and an alcalde

suplente, or vice-justice, who acted in the disqualification or absence of the alcalde himself. These officers were appointed by the prefect. (R., 27.) There were also *jueces de barrio*, or police officers, in different parts of the demarcation, and in the demarcation of San Ildefonso there were apparently four (R., 125), one of them located at Pojuaque. These last were merely police officers, the equivalent of constables under our system of government. (R., 112.) They had no judicial functions, unless (R., 111) it was to decide matters involving less than one dollar. But the judicial officer of the demarcation was the alcalde, an officer who, from the earliest Spanish times, invariably performed the duty of placing parties in possession of grants. This was a most important affair, involving, as was said in Pico's Case (5 Wall., 539), "the ascertainment and settlement of the boundaries of lands granted," and having "all the force and efficacy of a judicial determination." Such an act, one of the highest that fell to the lot of an alcalde, was never performed by any of his subordinates. No one so closely watches the exercise of his prerogatives as a minor official, and alcaldes under the Spanish régime were no exception. However, it is unnecessary to discuss the question of whether Jose Dolores Trujillo, who is alleged to have given possession, was a vice-alcalde or a mere *juez de barrio*, or constable, for Antonio Sena testifies that he appointed him "*alcalde* for the precinct or demarcation of Pojuaque." He does not say he appointed him alcalde *suplente* or *juez de barrio suplente*, but *alcalde*. Upon that statement his testimony

must stand or fall. Now, Pablo Ortiz (R., 102) testified before the surveyor-general that Jesus Maria Terrano was alcalde of the demarcation including Pojuaque in 1846, and that Teodoro Gonzales was his lieutenant, or *alcade suplente* (R., 102). This very Teodoro Gonzales (R., 107) also testified, and to the effect that Jesus Maria Serrano was *alcalde* of the demarcation in 1846 and that he (witness) was *alcalde suplente*. Jesus Maria Ortiz y Baca testified, both before the surveyor-general (R., 119) and on the trial of this case, at the age of 82 (R., 25), that Jesus Maria Serrano was *alcalde* of the demarcation both in 1845 and 1846, and that Teodoro Gonzales was *alcalde suplente* during the same period. Jose Manuel Ortiz testified (R., 108) positively to the same facts. All of these witnesses lived at or near Pojuaque in 1846, and they testified with positiveness and clearness not only as to the above facts, but equally as clearly and positively to the fact that Jose Dolores Trujillo was never *alcalde* or *alcalde suplente*, and that while he was at one time a *juez de barrio*, it was many years prior to 1846 that he held this insignificant position.

We thus have the *ex parte* testimony of Antonio Sena contradicted by the positive testimony of five witnesses who are, to say the least, as worthy of belief as Sena. In addition, the records of the justice of the peace of Pojuaque, embracing this very period were brought before the surveyor-general, by the then justice of the peace and present witness, Jesus Maria Ortiz y Baca (R., 81, 121), and were also brought to the Court of Private Land Claims on the present hearing (R. 30 and 50).

An examination of these records before the surveyor-general and before the court showed no trace of an appointment of José Dolores Trujillo as alcalde or to any other position in the demarcation of San Ildefonso, which included Pojuaque. On the contrary it did show that on December 6, 1845 (R. 130), the prefect appointed not Trujillo but José Maria Serrano *alcalde* for 1846; and at the very end of 1846 (R. 136), this same Serrano still acting as *alcalde* makes an inventory of the property of the demarcation in his possession; thus showing that he was alcalde during the whole year. Thus, Antonio Sena is flatly contradicted by the public records of the demarcation, which show that Serrano was appointed to the position to which he swears he appointed José Dolores Trujillo.

It is true that Mr. Catron, the attorney for claimants, testified on this hearing (R., 63) that when these papers were before the surveyor-general in 1878 he saw a paper dated "the very last days of December or in the first three or four months of the year 1846," in which Antonio Sena appointed Trujillo "alcalde or juez de barrio suplente of the jurisdiction of San Ildefonso at Pojuaque" (R., 64). If Mr. Catron meant by this to say that this paper named Trujillo as an alcalde suplente he directly contradicts Sena, who says he named him as alcalde; if he means to say it appointed him juez de barrio suplente, it even more strikingly contradicts Sena. In either event the existence of such a paper as above shown is negatived by five or six witnesses for the United States, who testified that other persons, naming them, held these

offices, and one of them (Jesus Maria Ortiz y Baca) testifying that he himself was juez de barrio at Pojuaque in June, 1846 (R., 27). The inaccuracy of Mr. Catron's recollection is further shown by the testimony of Mr. Eugene A. Fiske (R., 64), an attorney of standing and a recent United States attorney for New Mexico, who testified that he fully examined those records when they were brought before the surveyor-general for the express purpose of seeing whether Trujillo was alcalde (R., 65), and that there was no paper appointing him "alcalde in any form" to be found among these archives.

As these papers were brought in on behalf of Mr. Fiske's clients, it is natural to presume that Mr. Fiske examined them before Mr. Catron made the examination, and the fact that upon a thorough examination for the very purpose of ascertaining whether Trujillo was an alcalde he found nothing to indicate that he was such an officer goes very strong to refute Mr. Catron's assertion of the existence of such a paper. It is, moreover, passing strange that if Mr. Catron found such a paper at the time—a paper that would have completely destroyed the force of his opponents' evidence and have proclaimed as false the elaborate testimony offered by them—he said absolutely nothing about it at the time, and in cross-examining the custodian of these papers he never deigned to ask him a question as to this paper when such a question would have shown the witness to be a most reckless perjurer. Mr. Catron knew that all of this testimony being adduced in derogation of his clients' claim was to be transmitted to Congress for consideration; according

to his testimony he had at his command at that very moment a paper that would have branded the whole proceeding as a conspiracy against their rights, and yet he says not a word about it; he asks not a question tending to show its existence; he does not retain even a copy of it to use as secondary evidence should the original be lost, but allows this—the most important document imaginable to his clients' cause—to be returned to the notoriously insecure custodianship of a rural justice of the peace. It is inconceivable that an attorney of Mr. Catron's zeal and discrimination could be so blind to the interests of his clients in a matter of such great importance. The most plausible theory is and must be that this matter has become confused in his mind with some other case and that his testimony as contained in this record is all a mistake attributable to a lapse of memory.

The materiality of the assertion of Sena (R., 68) that he appointed Jose Dolores Trujillo as justice of the peace "for the precinct or demarcation of Pojuaque," about which there is so much controversy in the record, arises from the fact that this Trujillo is the party who appears in the title papers as the officer giving juridical possession (R., 74). It is to be noted in the title papers (R., 73) that the governor is represented as referring the petition "to the proper justice, that he may place him in possession of the land solicited," and that this Trujillo, purporting to act not as a juez de barrio nor as alcalde *suplente*, as he would have done had he been acting under any such appointment as is testified to by Mr. Catron, but acting as "the justice of the peace at said place" (Pojuaque),

proceeds to give the possession. That he was not alcalde or justice of the peace, that he was not alcalde *suplente*, that he was not juez de barrio or constable on June 8, 1846, is, it is believed, established by the overwhelming preponderance of the evidence in this case, and by the establishment of that fact not only is the falsity of the testimony of Sena as to a material point established and his whole testimony discredited, but the act of possession, which is a most important corner stone in the elaborate fabric erected by claimants, crumbles into dust, bearing down with it the whole superstructure.

Recurring to the testimony of Antonio Sena (R., 68), it will be noted that he testifies that "in the month of June, 1846, there was no stamped paper here, and we had to use common paper." The falsity of this assertion has been pointed out above. It is reverted to here merely for the purpose of still further showing the utter unreliability of the evidence of this one of the two star witnesses for claimants.

The witness goes on glibly to swear that "Juan Luis Ortiz and his heirs have always occupied the land as theirs, and it has always been reputed to be theirs." The character of the proof of occupancy shown in this case—its flimsiness and its entire unreliability—will be discussed hereinafter, but the contempt with which this witness treats the idea of going into details as to this possession does not impress one at all favorably as evidencing his disposition to enlighten the official before whom he was a witness.

Ramon Sena (R., 70) likewise identifies the signatures of Governor Armijo and Juan Bautista Vigil as genuine.

He then goes on to give an extended statement as to how this grant was made, and claims to have been present, not only at the signing of the order by Armijo, but at the giving of juridical possession. The blanket-like character of the testimony of this witness evinces a disposition to leave no feature of the case unsworn to, and shows that he was not unmindful of the family obligations resting upon him as the brother-in-law of the alleged grantee. No cross-examination having been had, the testimony in its narrative form does not go sufficiently into detail to make an analysis of it an easy matter. It seems, however, from the testimony of this witness, that the order of the governor was written by a clerk and that it was thereupon signed by Governor Armijo and Secretary Vigil y Alarid. An inspection of that order and the signature "Armijo" on the original paper will show that this is false, the same hand that traced the signature having written the order. Special Agent Tipton, whose testimony will be hereinafter considered more in detail, and who has made a most critical examination of these title papers, reviewing them both from the standpoint of an expert in penmanship and a person for years on intimate terms with the old Spanish and Mexican archives received at the date of the acquisition in 1848, testifies (R., 46) that in his opinion "the body of the decree was written by the same person who signed the name of Armijo attached to it."

Sena also swears (R., 71) that he was present when juridical possession was conferred upon Juan Luis Ortiz by Jose Dolores Trujillo, on June 8, 1846, and yet the certificate of possession does not bear his name as an

attending witness (R., 74), although he, according to his testimony, went all the way from Santa Fe at the request of the grantee to be a witness of this investiture of possession. It is remarkable, in this connection, that neither of the alleged witnesses to possession, as shown by the title papers, Ignacio Alarid and Miguel Gonzales (R., 74), were called by claimants to testify on this point before the surveyor-general. They were the proper persons to prove the genuineness of Trujillo's signature and the fact that he delivered possession, and their nonproduction for this purpose is as significant as the fact that their names on the original documents are manifestly in the same handwriting as is the signature of Jose Dolores Trujillo and the rest of the certificate of possession. This witness testifies in the same general manner as Antonio Sena to the occupancy and reputed ownership of this tract, and evinces the same disposition to aid his relatives in the establishment of their pretensions. Both of these persons swear that they saw Armijo sign this paper.

The question for this court is whether under all the circumstances, taking into consideration the facts heretofore discussed and those which will be presently considered, these two witnesses were, in their statements to the surveyor-general, telling the truth. Certainly, in their case the motives of human interest were most powerful. As has been several times stated hereinbefore, they were most closely connected by marriage with the alleged owners of this extensive tract of land. They each married daughters of the alleged grantee, Juan Luis Ortiz,

and were brothers-in-law of Gaspar Ortiz y Alarid, the moving spirit all through this proceeding before the surveyor-general. The fact that they unhesitatingly and brazenly swear they have "no interest in the case" does not remedy matters, but, on the contrary, casts further suspicion on their testimony. Bound by such ties to those who claimed this land, they could not but be interested in the outcome of the claim, and even though they had no direct pecuniary interest in it they had the strongest of sentimental reasons for desiring to see their relatives elevated to affluence by the acquisition of this great area of land. It took much fewer suspicious circumstances in the California cases to bring this court to the conclusion that oral testimony there was most untrustworthy. Some of the cases in which the utter unreliability of oral testimony has been discussed have been hereinbefore cited.

Among the most noticeable of these was *Luco's Case* (23 How., 515), where this court says, with but thinly veiled irony, that "owing to *the weakness of memory* with regard to the dates of grants signed by them, the testimony of the late officers of the late government of California can not be received to supply or contradict the public records or to establish a title of which there is no trace to be found in the public archives."

In *Bouldin et al* v. *Phelps* (12 Sawyer, 308) the grant document was rejected as antedated and fraudulent, although the governor whose name appears thereon himself swore that he signed it "at the time the paper was dated." The court rejected this testimony as that of "an apparently swift witness."

In the *Fuentes Case* (22 How., 454) the grant was adjudged fraudulent, although there was testimony by the clerk in the governor's office, Castro, that he himself wrote the body of the grant in June, 1843, at the time of its date.

In *Galbraith's Case* (2 Black, 394) the grant was rejected as fabricated, although Moreno, the secretary of Government, whose name appears on the grant or titulo presented as evidence, testified that "the signatures to the grant and to the certificate of approval were genuine and made at the time those documents bear date."

In *Nelcigh's Case* (1 Black, 298) although Governor Pico and Secretary Moreno, whose signatures were appended to the grant, testified in support of its genuineness, this did not save it from a judgment declaring it to be fraudulent; and in *White's Case* (1 Wall., 660) a like fate befell a grant purporting to have been executed by Governor Alvarado, although that official testified that he executed and delivered the grant to Ortega, the grantee, at the time it bears date.

The lack of weight which will be given in this class of cases to the testimony of interested witnesses is evidenced in the decision of this court in the *Cambuston Case* (20 How., 59), where Mr. Justice Nelson, in delivering the opinion, says:

> There is no evidence in the case that it [the grant document] was ever seen in or out of the possession of the claimant from its date down to the time of depositing it, as above mentioned, except that derived from one witness, who *appears to have been interested in the grant*, and whose testimony therefore *must be laid out of the case*.

In the *Palmer Case* (24 How., 128), this court quotes with approval the rule laid down in the Luco Case above quoted from, and adds:

> If the testimony of the officers of the Government can not be relied on *much less can that of more obscure individuals*, especially as we have seen in the Luco Case and some others that it is easy to obtain any number of witnesses to depose to any fact necessary to establish a fraudulent grant.

Under the decisions just quoted, and independent of these decisions under the facts as disclosed by the record, it is respectfully submitted the testimony of the two Senás must be "laid out of the case." This having been done, let us see what is left of plaintiff's claim. The only witnesses remaining are Judge Houghton and Pablo Dominguez.

Judge Houghton is shown by the record (p. 69) to have been a man of considerable prominence in the early days of the Territory. The effect of his testimony is nothing more than that he believed the signatures of Armijo and Vigil to be genuine, based upon his acquaintance with the parties from a time about two years anterior to the date of the grant. As both Armijo and Vigil retired to private life upon the American occupation and died within a few years thereafter (the date of Armijo's death, as a matter of local history, being in January, 1854), Judge Houghton's acquaintance with the signatures, if it extended, as he says (R., 70), over a period of twenty-five years, must have been derived from the archives or other papers upon which their signatures were seen after their death. His evidence is, in effect, that the signature

of Armijo presented to him looks like his other signatures. The lack of force in this testimony is perceived when we reflect that the basis of every forgery is an attempt at simulation. No one intentionally forges a signature in a manner such as to make it look unlike the genuine. To do this would be to defeat the very purpose of the iniquitous design. Houghton's statement, therefore, that he believes the signature genuine, based upon its similarity with other but genuine signatures, is merely a tribute to the skill of the penman, and even that faint praise is modified by the further statement that the signature is "signed somewhat differently from his usual way." The weakest of testimony on the subject of handwriting is that which is based upon a mere appearance of resemblance. This is most valueless because it is superficial. The presence of a resemblance does not disprove forgery, but sustains the accusation of its presence. In addition, such an opinion is one that any person with the proper standards of comparison before him can express. Judge Houghton's acquaintance with the handwriting of Armijo and Vigil was, as above pointed out, doubtless derived, at least in part, from the archives. We of the present day have precisely the same opportunities of comparison, because these archives, with their numerous specimens of Armijo's and Vigil's penmanship, are still in existence. This court has the opportunity, from the originals in possession of its clerk, to make such a comparison for itself without relying on Houghton's opinion. The numerous standards of comparison introduced, the photographs made, the whole of the archives, of which this court may take judicial notice, afford an op-

portunity quite as adequate as Judge Houghton's for determining whether the signatures here presented look like the genuine signatures of the then governor and secretary of New Mexico. This is, of course, a very different matter from the opinion resulting from an expert study of the handwriting, as illustrated in the testimony of Mr. Tipton, which will be presently considered. The one relates purely to the physical similarity or dissimilarity of two objects; the latter has to do with the very habits that enter into the construction of those objects. The one may result from art or simulation; the other is the result of years of use of the muscles of the hand for a given purpose, and in which the desires of the writer can no more alter the true characteristics of the writing than they can alter the organism of the muscles which reproduced those characteristics. The difference between the mere *looks* and the intrinsic identity of method that stamp the handwritings, however variant in appearance, as produced by the same person, will be considered hereinafter. Suffice it to say for the present that Judge Houghton's testimony simply says that the writing *looks* like Armijo's and Vigil's; even this he modifies by saying that one of them is signed "somewhat different from his usual way." But had he not modified his opinion this court, upon an inspection of the signatures, must have said they were most certainly "signed somewhat differently"—a difference that when studied with the aid of the microscope, the camera, and the expert becomes conclusive of the fact that Manuel Armijo and Juan Bautista Vigil y Alarid never saw the paper here presented as a muniment of title.

Claimants' fourth witness, Pablo Dominguez (R., 69), states that he knows the signatures of the parties well, had examined them and found them to be genuine. This is the sum and substance of Dominguez's testimony, if we except that portion of it which swears to occupancy and reputed ownership by Juan Luis Ortiz and his heirs in the same general manner adopted by the Senas. So far as Dominguez's testimony is *prima facie* concerned, it is the result of the same superficial character of comparison shown in Judge Houghton's testimony and is entitled to just about the same amount of weight. The introduction of this testimony of Dominguez by claimants led to the presentation by the Government of the testimony of Mr. Fiske (R., 64), which shows that in 1877, subsequent to the taking of his testimony, this same Dominguez in the presence of witness made a statement in writing to the effect that all the material facts he had testified to before the surveyor-general were false and that he so testified, although knowing nothing of them, at the request of Gaspar Ortiz y Alarid (R., 145), and that after his testimony Antonio Sena (whose testimony for claimants we have already considered) told him that he, Antonio Sena, and Gaspar Ortiz y Alarid had fabricated the papers of the Sierra Mosca grant; and this same Dominguez had further stated, at that time, that the signatures on the title papers presented were not the genuine signatures of Armijo and Vigil y Alarid. Mr. Fiske testified that this statement was reduced to writing, read over to Dominguez in his presence, and then and there sworn to by Dominguez before a notary public. The original of this statement, identified by Mr. Fiske,

was tendered in evidence by the Government and appears at pages 144, 145 of the record. A majority of the court was of opinion that this affidavit was not competent evidence (R., 67), a question which is to be now determined by this court on its consideration of the record. It will be noted that the testimony of Dominguez presented by claimants was taken in 1872. Neither at that hearing nor at any subsequent hearing was the Government a party or represented. As the affidavit of Dominguez was not made until five years after he gave his testimony, no foundation could have been then laid by the Government, even if represented, for the introduction of this impeaching testimony by the customary questions on cross-examination. Dominguez having died long prior to the trial of this case in the Court of Private Land Claims, and indeed prior to the establishment of that court (R., 8), there was no opportunity for the Government to recall him for cross-examination subsequent to the time when, by the act of 1891, his testimony, given in 1872, was made evidence against it. To allow the testimony of Dominguez presented originally, practically as an affidavit, to be used against the Government, and yet to decline to allow proof to be given of his subsequent admission under oath that that testimony was false, simply because the Government has, by reason of the death of the witness, been unable to lay the customary foundation for his impeachment would be to allow a miscarriage of justice and to permit the substance, which is the ascertainment of truth, to yield to the shadow of a technical rule of procedure. The law does not require impossibili-

ties; if the testimony of Dominguez was false, this and every court of justice wants to know it; surely no more satisfactory proof of its falsity could be adduced than the statement of witness himself to that effect under oath. This matter, it is respectfully submitted, is not controlled by the case of *Ayers* v. *Watson* (132 U. S., 394). In that case the contradictory statements, which it was sought to use for purpose of impeachment, were made years before three trials at which witness might have been cross-examined on the subject and the proper foundation for impeachment laid. As was pointed out in the dissenting opinion in the case of *Mattox* v. *United States* (156 U. S., 254), "the opposing party had no less than three opportunities to call the attention of the witness to the existence of his prior deposition and to cross-examine him upon it." As is suggested in the opinion last quoted, the rule requiring a foundation to be laid for contradicting a witness is "not a substantial rule of the law of evidence, but is merely one of practice." It has never been recognized at all in some of the New England States. In Georgia it has been held (*Molyneaux* v. *Collier*, 30 Ga., 745) that "it was a kindness or favor to the witness to call his attention to any portion of his previous examination, and he can not complain that his attention was turned to a part only."

In *Patterson* v. *Dushane* (137 Pa. St., 23) the general rule was conceded; but the exception in the case where a witness was dead was recognized in the following language:

> As to the second assignment, it must be observed that the conversation with Johnston which was

> offered in evidence took place after his deposition had been taken. He could not have been asked the question, on the taking of his deposition, whether such a conversation had taken place, because it had not then occurred. * * * It was his own declaration, tending to impair the effect of his previous testimony, and as such we know of no reason why it was not competent. Of course, if the witness had then been living, he should first have been recalled to the stand and asked whether he had made the declaration in question. But that was impossible by reason of his death.

In the case of *Conrad* v. *Giffey* (16 How., 38), which is often cited as showing the adoption by this court of the general rule making interrogations respecting a contradictory statement a necessary prerequisite to proof of such statement, it will be noted that the opinion of the court was rendered by Mr. Justice McLean. But in *McKinney* v. *Niel* (1 McLean, 540), decided apparently by that able judge himself, it was recognized that the rule had exceptions and testimony was admitted under what the court terms the "peculiar circumstances of the case"—circumstances, it is respectfully submitted, that are very similar to those in the present record.

It is true that this court in the case of *Mattox* v. *United States* (156 U. S., 237) has given expression to views which apparently conflict with the positions here urged. That case, however, differs from the present one at least in one important particular, and that is the fact that there it was sought to contradict the deceased witness by testimony of witnesses as to contradictory *oral* statements made by him. Influenced, apparently, to a large extent

by the danger of subjecting the testimony of deceased witness to attack based solely on a recollection of loose contradictory oral statements made by the witness, a majority of this court held proof of such statements inadmissible, unless a foundation had been laid therefor. In the present case, however, it is not sought to impeach the witness Dominguez by proof of loose statements subsequently made by him, but by proof of a written statement signed by him and solemnly sworn to. While it is true that written evidence, generally speaking, differs from oral testimony only in degree and in weight, still, if the admission of evidence of this character is a matter of procedure and not of principle, and if, as said by Judge McLean in *McKinney* v. *Nicl*, *supra*, the admission of such evidence is a matter dependent upon "the peculiar circumstances of the case," it is respectfully urged that the present is a case calling for a relaxation of the rule. It is administering no injustice to claimants to hold that their *ex parte* testimony before the surveyor-general was taken subject to the contingency that their witness would subsequently, under oath and in writing, recant and deny what he had formerly sworn to. Certainly the fact that he made this affidavit subsequently is "a circumstance" which, under section 5 of the act of March 3, 1891, the court is entitled to consider in order to determine the "weight" which the testimony "ought to have." It is further to be suggested that the Mattox decision was dissented from by three of the eight judges sitting in the case, Mr. Justice Jackson not taking part in the decision. Mr. Justice Field, who concurred in the majority

opinion, having since retired, the case can not be said to represent the views of a majority of this court as at present constituted; and under the circumstances counsel for the Government feel that they are not showing a lack of proper respect for authority in requesting that this court consider the question anew, and upon such reconsideration admit as evidence the written statement of Dominguez, made solemnly under oath five years after he had given the testimony by which claimants attempt to bolster up their case.

A reading of this declaration of Dominguez (R., 145) will not only show that his testimony is unworthy of belief, but that it was secured by subornation of perjury by Gaspar Ortiz y Alarid, the father of the two plaintiffs herein. It further shows in a direct way the conspiracy by which these title papers were hatched out by this same Gaspar Ortiz y Alarid and his witness—brother-in-law Antonio Sena. In other words, it gives in direct language the ultimate fact of fraud to which every item of trustworthy proof in the record points with the trueness of the needle to the pole.

It is respectfully submitted that upon this oral testimony for claimants—which is *all* their testimony—even if no other fact and no presumption arising from the facts be considered, claimants have failed to make out their case by "such weight of testimony as is necessary to establish their title to this large tract of land." (*Whitney* v. *United States*, 167 U. S. 529.)

Coming now to the testimony of the Government, it will be noted that its two witnesses upon this issue are

Donaciano Vigil (R., 97, 98, and 99), whose testimony before the surveyor-general was admissible by reason of his death, and William M. Tipton, special agent and expert for the Government.

Mr. Vigil was for years (R., 99) military secretary of the department of New Mexico, and was personally acquainted with Governor Armijo through association with him in an official way. He testified that he was military secretary to Governor Armijo through all his administration, was familiar with his handwriting and signature, and had seen him write. His personal relations with Armijo were close, and his opportunities for becoming acquainted with his handwriting thus better than in the case of any of the witnesses for claimants. Mr. Vigil testified that the signature of Armijo appearing upon the Sierra Mosca grant papers was in his opinion "not the same" he had seen him use all the time he was his secretary (R., 99); that the signature was not the same Armijo was "accustomed to write" (R., 100), and that he had 'never seen a genuine signature of Armijo that was like the one" presented in the Sierra Mosca claim (R., 100). The witness then identified the paper marked "Exhibit D" and set forth in full on page 97 of the record as containing the genuine signature of Armijo, which witness had seen him write (R., 100). The testimony of this witness was not shaken on cross-examination (R., 100, 101), although Mr. Catron, counsel for claimants, sought to prove that witness had had a conversation with him in which witness had admitted the genuineness of the grant (p. 101). It is worthy of remark that although witness denied this conversation positively, Mr. Catron, although

he took the stand on behalf of his clients' case, did not see fit to testify to the fact of his conversation and to Mr. Vigil's alleged statements on that occasion.

Mr. Tipton, special agent for the Government, testified to his belief in the fraudulent character of the signatures of Governor Armijo and Secretary Vigil on two grounds. The record shows that Mr. Tipton was for many years the custodian of these archives, handling them daily, and thus becoming acquainted with and familiar with the signatures thereon in the course of his business. His qualifications for testifying upon this subject have been utilized in the Court of Private Land Claims by counsel for grant claimants (see record in case of *Catron et al.* v. *United States*, No. 34, present term, involving the signature of this very governor), as well as for the Government, in scores of cases heretofore considered by that court, and the general recognition of the eminent abilities of Mr. Tipton to aid the court in matters of this character is shown by the announcement of the court (R., 33), that "the competency of Mr. Tipton to testify with reference to these archives and documents in the surveyor-general's office has been proven so often that, unless it is material in regard to this case, we think it unnecessary to pursue that question any further," and on page 34 of the record, where the court announces that it "will take the fact as proven." However, in deference to the insistence of claimants' counsel, the matter of Mr. Tipton's experience in these matters was gone into by the Government very fully and his competency as a witness was established beyond peradventure. (R., 34 et seq.)

Mr. Tipton's testimony as to the lack of genuineness of the disputed signatures was, in the first place, not as an expert, but as one possessing full knowledge of the archives and an actual acquaintance with the signatures of Armijo and Vigil y Alarid, an acquaintance that qualified him as thoroughly to testify as if he had known the parties personally and had seen them write. Such an acquaintance was held in *Rogers* v. *Ritter* (12 Wall., 317) to afford ample foundation for testifying on such a subject. In that case the court held that the testimony of Hopkins and Sears was admissible, although neither of them had even corresponded with the person whose signature was in question, and had never seen him write. It is well said by the court there that such witnesses, with knowledge based upon familiarity with the old archives, were "better able to judge of the signature of Sanchez than if they had only received one or two letters from him or seen him write his name once." (See also *Sill* v. *Reese*, 47 Cal., 294.)

Mr. Tipton also testified, as an expert on handwriting, that the signatures in dispute were not written by the same person who wrote the signatures of Armijo and Vigil y Alarid found in the archives, and especially the signatures found upon certain papers of undoubted genuineness, many of them from the archives and dated about the same time as the alleged grant, these signatures being used as standards of comparison. The originals have been transmitted to the clerk of this court and are subject to its examination. Upon cross-examination a number of other signatures of Armijo were produced and

presented to Mr. Tipton for his opinion by counsel for claimants. All of these Mr. Tipton identified as genuine, and they also are in the custody of the clerk of this court for its examination. Photographic reproductions of the disputed signature and of the signature on one of the standards of comparison (R., 138 and 139) are also in the record. (For discussion of use of photographs in this class of cases, see 18 A. and E. En. of Law, p. 425, citing *Marcy* v. *Barnes*, 16 Gray (Mass.), 161, and *Luco's Case*, 23 How., 515, where the court found photographs most useful on the question of forgery.)

The grounds upon which Mr. Tipton believes these disputed signatures to be spurious, when compared with those in the archives, are fully set forth in the record (p. 41, et seq.); and the results arrived at, when carefully considered in connection with the process of reasoning adopted and the differences detected as a result of this process, constitute little if anything short of a mathematical demonstration of the spuriousness of the signatures on the titles presented.

At the outset of a brief discussion of the scientific grounds upon which a comparison of hands proceeds, the necessity of eliminating the matter of similarity of general appearance as a reliable test must first be suggested.

As above pointed out, similarity of general appearance is the goal to which all attempts at forgery are directed. The methods by which the signature is formed, the underlying habit which frames the letters and creates the words—these are the matters to be studied; and it is only by doing this that the student may avoid the superficial conclusions to which such witnesses as Houghton

rush, who declare a signature is genuine because it *looks like* a genuine signature.

It is well known that persons possessing a high degree of skill in the use of the pen can forge signatures with such similarity of form and general appearance as to deceive even the person whose signature is simulated; hence it is evident that mere form and appearance are not safe grounds upon which to base an opinion as to the genuineness of a disputed signature, for two signatures may resemble each other in appearance and have been written by different persons, or they may have been written by the same person and be lacking in numerous points of resemblance. Consequently persons whose only knowledge of a signature is based upon having seen a person write, have no other means of judging as to the genuine character of a signature presented for their opinion than their recollection of form and general appearance, and as both of these may be easily imitated, testimony based upon such grounds is of slight value under any circumstances, and particularly so when a long period has intervened between the date of seeing the writing done and the date when a disputed signature is presented for examination.

But there is a sphere of examination of handwriting in which results worthy of thoughtful consideration may be arrived at, and in which the inquiry is directed not to the appearance of the writing but to the manner in which it was produced. Investigations in this sphere of inquiry are directed to the study of the personal characteristics appearing in the writing and to identifying therefrom the muscular habit that produced them.

Writing is an act accomplished by the exercise of muscular factors, and individual peculiarities of action existing in these or in their manner of cooperation are involuntarily introduced into it and appear therein as details indicative of their causes. When writing has passed the rudimentary stage attendant upon learning to write and becomes by frequent repetition a physical habit, the mental effort which at first was directed to the proper manner of holding the pen and to the correct formation of the letters is no longer so directed, but, on the contrary, is entirely occupied with the proper expression of the subject-matter, while the muscular factors, as a result of practice, mechanically form the characters desired without conscious mental effort. So true is this that no one whose attention has not been directed to the subject can, if requested so to do, describe to another the manner in which he is accustomed to hold and operate the pen, but in order to give the information desired is compelled to take up the pen and allow the hand to assume that position which practice and its physical peculiarities have rendered necessary to the performance of the act. When the restrictions attendant upon instruction as to how one should write are removed, each person adopts that manner of writing dictated by his convenience and comfort; that is to say, he writes in that manner that is easiest for him to write, and to every person that manner is easiest in which the muscular factors used in the act most harmoniously cooperate in its performance.

As a result of this condition, writing habitually produced has incorporated into it those evidences of individual habit, the existence of which is unknown to the

writer, and which are the effects of physical causes arising from the peculiar muscular organization of the hand. From these evidences, which have been *unconsciously* introduced into the writing, the writer's habit may be determined with great accuracy.

There are many features of handwriting which are the result of physical habit, such as the manner of holding the pen, the degree of angularity or rotundity given to certain classes of letters, the angles made by the latter with respect to the line on which the writing is done, the degree of ellipticity given to loops in letters projected either above or below the line, the relative degree of ellipticity between down curves produced at the tops of letters under the impulse given to the pen by the fingers and the upcurves at the bottom of letters produced by the thumb as the factor of impulse, and the measure of pen pressure which introduces shade into certain strokes.

Now, men no more write alike than they perform exactly alike any other act dependent upon the exercise of muscular functions, such as walking, running, etc., and although the number of muscles employed in the act be the same in all persons, in no two do these coordinate in its performance in exactly the same manner; but the manner in which they do operate in each individual is recorded in the writing itself, and in the hands of a competent investigator furnishes the means, when combined with the knowledge of how writing is produced, of identifying the individual habit of the writer and distinguishing it upon comparison therewith from that of any other person.

While observation also shows that no person can write two of his signatures so nearly alike that they will exactly coincide throughout, this affects only their form and appearance. If they be habitually produced they will be alike in those personal characteristics which distinguish them from copy-book forms and from the writing of all other persons.

One who has given careful study to this subject can point out many differences existing between a genuine signature and its simulation, although the real significance of the difference may be difficult to explain to one who has not prepared himself by previous study to understand that the conclusions arrived at naturally proceed from their premises, just as an educated lawyer who perfectly understands a legal proposition may not be able to explain it so that laymen devoid of legal education can perceive its force. Then, again, many of the personal characteristics of handwriting consist of details not easily perceived until examined by the microscope, and not even then understood except by those who have made their investigation a matter of special study. There are features of handwriting which may be important and which are perceived by the eye of the experienced observer only, and which can no more be described to one who has not studied the subject than a color can be described so as to be understood by one who was born blind. Consequently in the case of the testimony of an expert in handwriting, if there be reason to believe that he is competent to make intelligent investigation and that his opinion as stated has been an honest one, there is much which if it is to be

believed must be accepted as true by those who have not prepared themselves by previous study to understand it.

If a writing be produced in imitation of another, no matter how skillfully it be done, it requires the imitation of unusual forms by a habit of writing unaccustomed to their production, and it must of necessity contain the evidence of another physical habit than that of the person whose writing it simulates, because, although the forger may be able to imitate unaccustomed forms with great accuracy of appearance, it is impossible for him to change the physical organization of his hand and the individual manner in which the muscular factors thereof cooperate in writing, and consequently impossible to avoid introducing into the simulation those evidences of his own individual habit, of the existence of which he is ignorant and which are the result of physical conditions beyond his control.

Applying to the examination of the signatures selected as standards the principles hereinbefore briefly outlined, in connection with the knowledge of how writing is produced, the conclusion was reached that all were written by the same person, while the comparison of the signature in dispute with the standards showed that the former was not written by the same hand that wrote the latter, but on the contrary was the production of a physical habit of writing distinctly different from that which produced these.

Many of the differences existing between the standards and the disputed signature have been pointed out in the testimony of Mr. Tipton. All of these are not of

equal importance, and even if they were it would not be practicable to analyze them in detail within the limits of this brief; but there are two which are comparatively easy of explanation even to those who have not had occasion to study the subject of disputed handwriting and which are of vital importance from an expert standpoint as well as at the same time illustrative of the principles upon which the examination of this alleged signature of Armijo was conducted.

The muscular factors of the hand that produced the signatures used as standards so coordinated in writing as to give to the signature a general characteristic of angularity, which is particularly prominent at the tops of the *m* and *i*. When there is any difference in the degree of angularity between the top and bottom strokes, it is greater at the top. This marked angularity in the places referred to is owing to the fact that when the upstrokes of the *m* and *i* were produced, under the thumb impulse, there was no marked lateral movement to the right given to the pen near the tops of these strokes, and when the thumb ceased to operate as a factor of impulse it immediately gave way to the finger impulse in a direction forming an acute angle with the upstrokes, thus giving to the tops the serrated appearance referred to in the expert testimony. At the same time the letters *r*, *m*, and *i* were made of about the same height. Both of these features are characteristic of the writer's habit in making his signature.

In the case of the disputed signature the characteristics are entirely different. The upstrokes of the *m* as

they neared the top of that letter were projected toward the right by the lateral movement of the pen under the thumb impulse, thus forming, in connection with the downwardly projected strokes under the finger impulse, the broad rounded tops, which are as distinct in appearance from the similarly situated strokes in the standards as they are different in method of production. In the case of the upstroke of the *i* it will be observed that one of the same influences that operated to round the tops of the strokes of the *m*—that is, the thumb—was here manifested by a lunge to the right near the top, which gives to the stroke a shoulder-like angle at about two-thirds the height of the letter. The downstroke of the *i* at the bottom instead of being curved upward and to the right to join the *j* is turned downward and to the left away from that letter, there being no connection between them nor any evidence of any attempt to that end. In regard to the height given to the letters *r*, *m*, and *i*, it will be observed that they gradually decrease from left to right, the *i* having less than one-half the vertical height of the *r*. This peculiarity is a concomitant of writing produced by the hand resting without motion upon the table, while the letters are formed by the flexure of the fingers and thumb. In writing produced under this condition the hand does not move from the point of rest, and as the writing progresses toward the right the reach of the fingers is necessarily restricted and the height of the letters correspondingly decreased. That this method of writing was not an anomalous departure from Armijo's customary habit of writing but a habitual method of

writing in the person who signed his name on the Sierra Mosca grant is evident upon comparing the signature with the body of the marginal order immediately above it, where the evidences of the exercise of the same muscular factors that wrote the signature are found in numerous places and in various degrees of emphasis. Here will be found the same method of introducing rounded curves into the tops of *m* and *n* that was remarked in connection with *m* of the signature, and which was distinguished from the physical habit of Armijo in producing the same letter; here also will be found the diminution in height from left to right in letters produced by the flexure of the fingers and thumb while the wrist was rested without motion upon the table, which method of pen manipulation is found neither in Armijo's signatures nor in his other writing.

The observations just made are only a few of a large number that might be suggested as showing the variance of characteristics between the genuine signature of Armijo and those present in the signature purporting to be his on the Sierra Mosca title. These observations also apply to the signature of Secretary Vigil y Alarid on the grant in question. The application of these principles to the different signatures and handwritings found in the title paper leads to conclusions which, though independent of each other, are entirely harmonious, and which, taken together, leave room for only one conclusion, and that is the utter lack of genuineness in this title paper.

Not only is the signature of Armijo and that of Juan Bautista Vigil y Alarid each a forgery, as above pointed

out, but the signature of Jose Dolores Trujillo, the person alleged to have given possession, is also not genuine. All of the testimony is to the effect that only one Jose Dolores Trujillo had ever lived in that demarcation of San Ildefonso within the knowledge of the witnesses (R., 102, 108, 109). Among the papers from the archives from the justice of the peace, introduced in evidence by the Government, was "Defendant's Exhibit R.—Tipton," showing a controversy "in the precinct of Cuyamungue, jurisdiction of San Ildefonso," in the month of February, 1839 (R., 122). This document was introduced by the Government as showing the fact that while the jurisdiction of San Ildefonso included a number of precincts, among them Cuyamungue and Pojuaque, there was but one justice of the peace for the whole jurisdiction, and he held court in the various precincts or *barrios* of his jurisdiction or demarcation. This paper is, however, highly important from another standpoint. It will be noted that one of the names attached to it is that of Jose Dolores Trujillo. This paper being in evidence for another purpose, it is competent for the court, even without the aid of expert testimony, to use it as a standard of comparison by which another paper in the record may be tested. The original of this document (Exhibit R.—Tipton) has accordingly been certified up and is now in the custody of the clerk of this court for its examination. It will require but a glance to see that the signature of Jose Dolores Trujillo in that paper, which is an ancient document, coming from the archives of the justice of the peace of that jurisdiction, is not the same as that appearing at the foot

of the act of possession in the grant document here presented. Both of these signatures can not be genuine—which is? The signature on a paper coming from the proper custody and dignified by an existence of sixty years in that custody, or one upon a document which has been from its first appearance an object of suspicion and whose fraudulent character is now a matter of clear proof? The spuriousness of the signature of Trujillo adds another and very strong link to the chain of evidence against this claim.

Another most important link in that chain of evidence is the fact that Jose Dolores Trujillo, whose name appears as a justice of the peace of Pojuaque in the act of possession forming part of the muniments of title, did not at that time hold that position, it being held by a party named Jesus Maria Serrano. The testimony bearing on this most material fact in the case has already been discussed in connection with the testimony of Antonio Sena, and need not be further referred to here.

Another noticeable fact in connection with this record is the total absence of satisfactory proof of possession by the alleged grantee and those claiming under him. In a case of this kind, where *bona fides* is the matter of controversy, clear proof of occupation from the date of the grant by those claiming under it would no doubt have done much to remove the suspicion arising from the defects of the title papers. On the other hand, the absence of such proof tends greatly to strengthen all such unfavorable presumptions. In the face of these indisputable propositions we find that claimants introduced before the

court below not a single interested person living on the property, and not a single witness to show that persons claiming under the grant are living or have ever lived on or exercised dominion over the premises.

From the testimony (R., 18) it appears that a number of settlements exist within the boundaries of the grant, and yet not a single person deraigning title under Juan Luis Ortiz, the alleged grantee and living in those settlements, is produced. The only inference from this failure to prove is inability to prove. The whole of plaintiffs' case as to possession rests upon the testimony of the two Senas and Dominguez, above discussed, in which they swear in the most general manner that "Juan Luis Ortiz and his heirs have always occupied the land and it has always been reputed to be theirs." When did Juan Luis Ortiz occupy it? When did any of his heirs occupy it, and which of them? Plaintiffs might have thrown some light on the subject, perhaps, but they did not do so, and their failure to either attend the trial or testify in their own behalf is most significant.

So far from there being evidence to show possession or exercise of ownership, the evidence in the record is all to the effect that there has *not* been such possession or occupation. Witness Jose Ortiz, who still lives at Pojuaque, testified (R., 18) that he knew of no children or grandchildren of Juan Luis Ortiz living within the tract, and that the grantee for ten or twelve years before his death, which occurred in 1859 or 1860—and thus practically from the date of the grant up to grantee's death—lived in Santa Fe, clerking for his son, Gaspar Ortiz y

Alarid. (R., 19–20.) In the summer and fall of 1846, which was just after the date of the grant, he was living at Pojuaque, which is miles away from the tract, his home being at that time next door to witness, Pablo Ortiz. (R., 103.) The wife of Gaspar Ortiz y Alarid, Magdalena de Ortiz, called for plaintiffs, testified even more strongly on the subject. Her evidence was (R., 13) that Juan Luis Ortiz, the alleged grantee, had died at the home of her husband in Santa Fe in 1861 or 1862; that he had always resided at their home and had lived there for twenty or thirty years before his death. (R., 13.) If this be true—and it is the testimony of the mother of plaintiffs, called as a witness in their behalf—Juan Luis Ortiz never lived upon the grant. As he was his son's clerk in Santa Fe, he could hardly have cultivated it, so that he complied with neither of the only purposes for which lands could be petitioned for or granted under section 1 of the Regulations of 1828—"for the purpose of cultivating them or living upon them."

So far from there being proof of occupancy by Juan Luis Ortiz, the testimony of a number of witnesses (R., 103, 107, 109) is that a large portion of the tract herein sued for was occupied for forty years prior to 1878 by the heirs of Gaspar Ortiz y Pais under claim of the grant alleged to have been made to him in 1806 (R., 79). If Juan Luis Ortiz ever occupied any of this property, he must have done so under the grant last named, he being a son of Gaspar Ortiz y Pais, the grantee therein (R., 103).

Not only did Juan Luis Ortiz not occupy or exercise ownership over this property during his lifetime; he did not even claim it.

It is incredible that the donee and owner in fee of a tract of land of this size should have said nothing of it to his neighbors and that the making of the grant should never have been heard of in the community until many years later. The force of such a circumstance was recognized in *Cambuston's Case* (20 How., 64), where among the circumstances leading to the rejection of the grant was the fact that although purporting to have been made on May 23, 1846, it "was unknown to any person besides the grantee himself and another interested party, until filed among the public archives, 10th July, 1850." In *Luco's Case* (23 How., 539) the fact that the grant was kept a secret and made its public appearance for the first time only in 1853 is mentioned by the court as a most remarkable and suspicious fact as bearing on the genuineness and *bona fides* of the claim. So also in *Bouldin et al* v. *Phelps* (12 Sawyer, 308), where the grant was rejected, among the suspicious circumstances connected with it being the fact that there was adduced "no satisfactory evidence that the grant was seen by any one prior to the spring of 1850."

In this case the facts are equally significant. Witness Jose Ortiz, who lived only about 300 yards from Juan Luis Ortiz, at Pojuaque, and was moreover a nephew of his, testified (R., 19): "I did not know, in all the time that he [Gaspar Ortiz y Alarid] lived at Pojuaque, that he claimed any land. I did not hear about this claim

until the year 1872, in the office of the surveyor-general." Julian Ortiz, likewise a neighbor and relative, testified (R., 22) that he did not hear it stated until 1871 that Gaspar Ortiz y Alarid was before the surveyor-general with the grant and that it belonged to Juan Luis Ortiz. He further testified (p. 22) that he had not heard of a grant to Juan Luis Ortiz previous to its presentation to the surveyor-general. Jesus Maria Ortiz y Baca testified (R., 28) that he never heard of a grant alleged to have been made to Juan Luis Ortiz until the investigation before the surveyor-general. Teodoro Gonzales, who was the lieutenant alcalde of that jurisdiction in 1846 (R., 107), testified that he had never heard of such a grant or possession as Sierra Mosca. Pablo Ortiz, a first cousin of Gaspar Ortiz y Alarid, testified that he and Juan Luis Ortiz were *compadres* and lived adjoining, only a wall separating them, during summer or fall of 1846 (R., 103), and that he never heard him say anything about having applied for a grant. This testimony is not of a mere negative character showing that parties had never heard of the grant, but it is the testimony of persons living near the land in question, neighbors and near relatives of the alleged grantee, on friendly terms with him and visiting him; persons who, if possession of this princely domain had been given Ortiz, would have known of it; persons to whom he would have mentioned his good fortune had he been the recipient of so marked a degree of favor from the Government. And yet we find these witnesses all testifying that they never heard of the claim until it was presented to the surveyor-general in 1872.

Further, the actions of Juan Luis Ortiz and his son, Gaspar Ortiz y Alarid, about this time affirmatively show that they had no grant. According to the testimony of Magdalena de Ortiz, widow of Gaspar Ortiz y Alarid (R., 14), Juan Luis Ortiz told his son to buy up interests in the lands "from his relatives." On cross-examination she testified that the relatives referred to were "brothers and sisters and cousins and nephews" (R., 16). But the "cousins" had no interest in the Juan Luis Ortiz grant; their interest, if any, was in the older Gaspar Ortiz y Pais title (R., 79), a grant lying entirely within the Juan Luis Ortiz grant. (See map opposite page 79.) But why should Juan Luis Ortiz advise his son to acquire title from his cousins, "in order that he might remain with all the property that he bought from them" (R., 14), if Juan Luis Ortiz and his children already owned the land under the grant from the governor herein claimed? Further, we find from the testimony of Julian Ortiz, a son of Jose Manuel Ortiz and a grandson of Gaspar Ortiz y Pais (R., 21), and who therefore had an interest in this old Gaspar Ortiz y Pais grant, that between 1859 and 1866 Gaspar Ortiz y Alarid, son of Juan Luis Ortiz, attempted to purchase from his father a portion of the land that came to him by inheritance from Gaspar Ortiz y Pais (R., 23). Here, again, we find a person who, according to plaintiffs' case, was the owner of the land already by title from the governor, attempting to secure title by purchase under another grant. While the testimony of Julian Ortiz is not ideally lucid, a fair statement of the remainder of it is that when his father refused to sell his patrimony,

Gaspar Ortiz y Alarid became indignant and thereupon declared that he had a grant to the land anyhow, and about that time the title paper of 1846 came first to light. It was doubtless at this time that those congenial spirits, Gaspar Ortiz y Alarid, the disappointed investor, and Antonio Sena, the subservient brother-in-law, put their heads together, as described in the affidavit of Pablo Dominguez (R., 145), and evolved the grant of 1846, a worthy offspring of such illustrious parentage.

In conclusion, it is respectfully urged and confidently submitted that the overwhelming weight of the evidence shows the title papers herein to be spurious and forged, and that a decree should be entered on that ground, as well as upon the others urged in this brief, rejecting the claim and dismissing the petition.

Respectfully submitted.

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Appendix No. 1.

THE HEIRS OF WILLIAM PINKERTON ET AL.
v.
THE UNITED STATES ET AL.
} No. 46.

GERVACIO NOLAN GRANT.

OPINION BY MR. JUSTICE MURRAY.

I am of the opinion that the grant is utterly void even if it had been made to all the petitioners. The governor of the department of New Mexico at the date of this grant had no power or authority to convey any part of the public domain or even to initiate proceedings looking to the making of such conveyance.

The colonization law of August 18, 1824, and executive regulations issued on November 21, 1828, to carry into effect the provisions of the law in the Territories, was a scheme to gratuitously colonize all the vacant land belonging to the Republic, with the restriction contained in articles 4 and 7. It was possible under the provisions of the law and regulations for any foreigner or citizen to acquire in any State or Territory of the Republic 11 square leagues, or about 48,000 acres, of land without money and without price, and as an inducement to individuals to

influence families to immigrate to Mexico the government guaranteed "the contracts which empresarios might make with families they might bring at their own expense," and as a further inducement colonists were exempt from taxation for a period of four years.

On April 6, 1830, a law was passed article 11 of which prohibited foreigners from colonizing on the borders of any foreign governments.

The decree of November 25, 1833, repealed article 11 of the law of April 6, 1830, and authorized the Government to expend a sum of money for the purpose of colonizing the Territories. On the 4th of February, 1834, a circular was issued based on the law of November 25, 1833, offering to pay expenses of colonists who would remove to Coahuila and Texas (both being one State).

As early as January 26, 1831, a general department of the revenue was established, vol. 2, p. 308, Legislacion Mexicana. A circular was issued by the treasury department in relation to the revenues on July 7, 1831, Legislacion Mexicana, vol. 3, p. 341; and a general regulation was issued on July 20, 1831, vol. 2, p. 351, No. 963, Legislacion Mexicana. These laws and regulations materially changed the law of 1824. The junta de almoneda (board of sale) was created with powers to sell certain lands and the necessary machinery to collect the revenue belonging to the Republic was provided for. Mexican Statutes, vol. 2, pp. 303 to 351.

The Republic, prior to 1835, had contracted a large debt and was unable to even meet the interest upon it. The people had become dissatisfied with their form of government. The policy of gratuitous colonization of the public domain seemed to have proved a failure. A central system of government was created. The several States and Territories of the Republic were abolished and departments created in their stead.

And on the 29th day of December, 1836, the constitution of the new government was adopted. (Mexican

laws, vol. 3, p. 230, No. 1836.) The change of the form of the government did not liquidate the large debt which had been created by the Republic. This was to be provided for. So with the change of the form of government a change in the former system of colonization of the public lands was inaugurated. On the 17th day of January, 1837, twelve days after the adoption of the constitution, an act was passed by Congress creating a national bank and creating a mortgage in favor of said bank on all the vacant lands in the territories for the purpose of raising money. (Mexican Statutes, vol. 3, p. 363.)

And to further provide for the payment of the national debt the following law was enacted:

"April 4, 1837, Hall's Mexican Laws, page 115. The Government, with the concurrence of the council, shall proceed to carry into effect the colonization of the lands that are, or ought to be, the property of the Republic, by means of sales, leases, or mortgages, applying the proceeds thereof (which in the first instance shall not be less than 10 reals per acre) to the payment of the national debt already created or that may be hereafter created, always reserving a sufficient quantity for the fulfillment of what has been promised to soldiers who took part in the war of the independence and for giving of rewards and making concessions which Congress may decree in favor of Indian tribes or nations and those persons who assisted in the restoration of Texas, without complication arising from the laws enacted up to the present time in relation to colonization, the provisions of which, in so far as they are in conflict with the present law, are hereby repealed (Derogar), the prohibition of the eleventh article of the law of April 6, 1830, being renewed." Thus it will be seen that the seventh article of the law of 1824 and the eleventh article of the law of April 6, 1830, the latter being merely the exercise of the power reserved by the former, were continued in force. This law of April 4, 1837, applied to all the vacant lands belonging

to, or ought to belong to, the nation, and every acre of it, under the express provisions of the act, was to be colonized (if at all) by means of sales, leases, and mortgages, except such as might be disposed of under the reservation in favor of soldiers, etc. The proceeds arising from such sales, leases, and mortgages were to be paid on the public debt. All former laws on colonization in conflict with its provisions were repealed. The language seems too clear for misconstruction. It followed necessarily that all former colonization laws which provided for the gratuitous colonization of any part of the public domain was in direct conflict with it. The same land could not be colonized under the provisions of this law at 10 reals per acre and at the same time be gratuitously colonized under the law of 1824.

In the decision of questions arising under these laws we should look to the construction put upon them by the highest official of the Mexican Government. There are no reported decisions of their judicial tribunals. We must therefore look to the legislative and executive departments.

I have shown that a law was passed on the 26th of January, 1831, which established a general department of the revenue, and that a circular of the treasury department was issued on July 7, 1831, and general regulations for collecting the revenue belonging to the Republic by sales, etc., was issued July 20, 1831. On the 17th day of April, 1837, an act was passed to make effective the colonization law of April 4, 1837. This law provides for a new board of sale and regulations in relation to the disposition of the public lands, and continues in force all former laws in relation to collecting the revenues not in conflict with it, and article 92 makes it the duty of the officer created by the act to discharge all the duties of the officers under former laws not in conflict with it, so that it will be seen that all regulations for

collecting the revenue belonging to the Republic contained in all former laws not in conflict with said act of April 17, 1837, became a part of the general revenue laws and regulations of the central government and was to be enforced by the board of sale created by that act (Report Amellego, p. 330) and the act of April 17, 1837, together with the revenue laws and regulations adopted by it, constituted a complete system of collecting the revenue of the central government at that date, and all the public lands were to be disposed of by public sales, all contracts for sale to be approved by the government before they were made.

On April 12, 1837, an act was passed which provided a scheme for funding the national debt, and the following September a convention was made with the English holders of Mexican bonds for the purpose of getting the creditors to accept the scheme provided for by the act of April 12, 1837, which provided for funding the national debt, and provided for its ultimate payment by means of sales and mortgages of the public lands, as provided by the law of April 4, 1837. The creditors objected to the reservation in favor of soldiers, etc., contained in said act of April 4, 1837.

The result of the convention was that terms were agreed upon by the Mexican officials having the matter in charge and the creditors of the Government. The terms of the agreement were reported to the Mexican Congress, and on June 1, 1839, an act was passed approving the same and providing the means for carrying it out. (C. L., vol. 3, p. 624, No. 2056.)

The fifth article of said act provides, "That the reservation provided for in the law of April 4, 1837, shall be satisfied as follows: As to those lands that were to be given as rewards to soldiers of independence, their selection was to be made in Yucatan and the Californias; those which might be granted to Indians, to be located

on the frontiers, and those that might be given to soldiers who had participated in the restoration of Texas were to be located along the coast on the Gulf of Mexico, within a distance of 25 leagues from the seashore." Article 3 provides, "with respect to the colonies which may be established in virtue of this convention, the Government will take care that the laws now in force or those which may be enacted hereafter on the subject of colonization shall be observed in all respects in which they do not conflict with the convention itself." The agreement in relation to funding the national debt provided for two classes of security. The first was bonds, the second land warrants; the interest on both was secured by a pledge of certain customs revenues. The warrants were to be satisfied by location upon vacant public land at the rate of 4 acres per pound sterling, but such location was subject to restriction under the fourth and seventh articles of the law of August 18, 1824, and eleventh article of the law of April 6, 1830.

These articles relate to foreigners within the border littoral leagues and are the only provisions of either of those laws that remain in force.

As further security for the consolidated debt, the Mexican Government mortgaged 100,000,000 acres of land in the departments of California, Chihuahua, New Mexico, Texas, and Sonora as a special guaranty fund until the debt was paid, but provided that the mortgaged land might be sold at no less than 4 acres per pound and proceeds to be paid by the purchaser to the agent of the Government at London, to be applied to the payment of said consolidated debt. Also, 25,000,000 acres were especially set aside in the department nearest the Atlantic, upon which the land warrants might be located. This law also provided for a bureau of colonization to be composed of three persons, who were to be under the immediate control of the Supreme Government. They

were to survey the landmark boundaries, etc., and carry out the policy declared by the convention of September, 1837, in relation to funding the national debt. (Hall's Mexican Law, pp. 115 to 119.)

The scheme for funding the national debt shows that neither the officials of the Mexican Government nor the English holders of Mexican bonds believed that the colonization law of 1824 was in force. Before consenting to the scheme proposed by Mexico, the English creditors required that the land, which might be granted under the reservation of the law of April 4, 1837, should be specifically located. The reason for this insistence is obvious; they wanted to be able to determine about the value of the land to be pledged as security for the consolidated debt, and this they could not do, unless they knew about the quantity and location of the land to be pledged.

The creditors also required that in colonies which might be established in virtue of the convention, the Government should see that the laws now in force or those which might be enacted on the subject of colonization should be observed. The law of April 4, 1837, then in force, provided that the public lands should be colonized by sales, etc., for not less than 10 reals per acre, the proceeds to be applied on the national debt. So the creditors were deeply interested in providing for the enforcement of this law.

It was also provided, as I have shown, that 100,000,000 acres of land was pledged as a special guaranty for the payment of the consolidated debt, which land might be colonized by the Mexican Government (provided the agreement made by the convention should be ratified) at not less than $1.25 per acre, the proceeds to be applied on the debt. The creditors were therefore interested in having this provision carried out when it became a law.

But all this precaution was not only useless but worthless if the governors of the several departments could have gratuitously colonized the public lands of the Government by granting 48,000 acres to any one person who might comply with the provisions of the law of 1824 and the regulations of 1828.

The creditors could not have been interested in having any colonization law carried out by the Government of Mexico that provided for the disposition of the vacant public lands, otherwise than by sales, leases, etc.

There is no presumption in favor of the power of the governors of the departments to make grants to the vacant lands belonging to the Mexican nation. (See *United States* v. *Cambuston*, *supra*; *Jones* v. *Garza*, *supra*.)

The constitutional law of December 29, 1836 (sixth law, p. 254, vol. 3. Legislacion Mexicana), defines the duties and powers of the governors of the departments as follows:

"Article 7. The duties of the governors are: I. To take care of the preservation of public order in the internal matter of the department. II. To dispose of the armed forces that the laws give him right to dispose of, for that purpose. III. To comply with and make others comply with the decrees and orders of the General Government and the acts of the departmental boards (junta departmental), which shall have received the previous approval of Congress, in those cases in which that approval is requisite. IV. To send to the General Congress, together with his report, all the acts of the departmental junta. V. To make the appointment of prefects, approve the appointment of subprefects in the department, confirm that of justices of the peace, and to remove any of these said officers, having first sought the opinion of the departmental junta touching the removals. VI. To make the appointment of such officers of the

department whose appointment is not reserved to other authority. VII. To suspend as long as for three months and deprive of as much as one-half of their salaries for that time any of the officers of the department. VIII. To suspend the ayuntamientos of the departments by the consent of the departmental junta. Whenever the governors shall have made use of any of the powers granted to them in this and the foregoing paragraph they shall at once report the matter to the General Government, in order that it, according to its powers, may provide what it thinks proper in the matter of the said suspension. IX. To settle such doubts as may come up in the matter of elections of the ayuntamientos, and to accept, or decline to accept, the resignation tendered by that body. X. To make use of the exclusive prerogative mentioned in article 12, paragraph 17, and article 22, paragraph 8, of the fifth constitutional laws (which articles provide that he shall preside over the departmental boards, and in case of a tie to cast a vote, but at no other time). XI. To urge the courts and judges to the prompt administration of justice, reporting the faults of the same to the proper superior authorities. XII. To exercise vigilance over the offices of the revenues (hacienda) of the department in such manner as shall be provided by law."

Decrees and orders of the provisional government, volume 2, from July, 1842, and July, 1843, called "Organic Bases," prescribe the powers and duties of the governors as follows:

"Article 140. The duties of the governor of the department are:

"I. To maintain public order in the internal affairs of the department.

"II. To publish the laws and decrees of the National Congress and the decrees of the President of the Republic three days at the latest after receipt of the same by him,

seeing to it that they are obeyed and complied with in the territory over which they have authority.

"III. To publish the decrees of the departmental assembly and see to it that they are obeyed and complied with.

"IV. To send to the Supreme Government the decrees of the departmental assemblies.

* * * * *

"Article 142. The powers of the governor of the department are:

"I. To return within eight days to the departmental assemblies the decrees enacted by the same whenever he deems them repugnant to these bases or the laws. Should the assembly, after the return, insist on their passage, the governor will then send them within eight days to the Government for the purposes stated in Paragraph XVII of article 66, in the meantime suspending their publication.

"II. To return to the departmental assembly once within eight days such decrees as are passed by them which shall not be repugnant as stated in the foregoing article, giving the reasons that he shall have against their enactment. Should the assembly still insist upon their passage, he, nevertheless, shall not fail to publish the same.

"III. To appoint the inferior political officers of the department.

"IV. To appoint the officials whose offices shall be created to collect and distribute the revenues belonging to the department. In the making of these appointments the present incumbents shall be allowed to remain in office.

"V. To propose, with the concurrence with the departmental assembly, to the President of the Republic three names for the appointment of the superior judges, judges of the court of record, and assessors, after hearing in all cases the reports of the superior courts.

"VI. To discharge in the case of employees of the department that same power given to the President by paragraph 8, article 87, and to impose fines on those who shall be guilty of disrespect, in such cases and manner as the law may provide.

"VII. To take care that justice be administered without delay in the department, in the same manner as it is the duty of the President of the Republic to do so.

"VIII. To be ex officio President of the departmental assembly with a right to vote in the proceedings in case of a tie, since he has no right to vote on the strength of his election.

"IX. To dispose of the police forces for the ends for which they are instituted.

"X. To be the chief of the public hacienda of the department, and with regard to the Federal hacienda he shall exercise such vigilance as the laws grant to him.

"XI. To grant the permits for the establishment of public literary societies or charity associations, and to revise their by-laws, amending them in whatever is repugnant to the laws and to public order."

The governors had no power or authority to make grants of the public lands by virtue of their office, and I have shown that no such power was conferred upon them by law. The constitution of 1836 prohibiting them from exercising any power not conferred by law is as follows: "Restrictions on the governors and departmental juntas. They can not exercise any other authorities than those which are designated by law. The violation of this article and the two preceding ones being a matter of the greatest responsibility." (See constitution of 1836, sixth law, sec. 15, paragraph 3, vol. 3, Legislacion Mexicana, p. 256.) The regulations of 1828 applied alone to the lands in the territories, and authorized the governors with the approval of the provincial deputations to grant the public land.

But these regulations could not apply to the governors of the departments and departmental juntas (boards), created after the provincial deputations, and the office of territorial governors had been abolished, unless Congress had so directed.

I have shown that the States and Territories of the Republic were abolished and a new constitution adopted in 1836, and the former States and Territories made departments of the Central Government. The regulations of 1828 never did apply to the public lands in the States, and certainly could have had no application to the lands in the departments which had formerly been within the States. The Chief Executive of the Mexican Republic never had any authority to dispose of the public land or to confer power on anyone else to do so unless he was authorized by some law of Congress. He derived his authority to make the regulations of 1828 from article 15 of the law of August 18, 1824. (Hall's Mexican Law, sec. 501, p. 149.)

If the regulations of 1828 applied to the public lands in the departments which had formerly been within the territories, no land could have been colonized under the law of 1824 or regulations of 1828 except in such departments. The legal title to all the vacant land was in the nation, and could not be conveyed by any one for any purpose without an act of Congress authorizing it to be done. Article 5 of the law of the 18th of August, 1824, provides that, "If for the defense or security of the nation the Government of the federation should see fit to use any portion of these lands to construct warehouses, arsenals, or other public buildings, it might do so with the approval of the general Congress (Hall's Mexican Law, sec. —, p. —.)" On the 6th day of April, 1830, Congress passed the following law: "Article 3. The Executive shall have power to take the lands he may consider suitable for fortifications or arsenals * * *

(See C. L., vol. 11, p. 154, No. 691.)" So it will be seen that before the Chief Executive could appropriate public land for public purposes he must be authorized to do so by an act of Congress.

The officials in New Mexico paid no sort of attention to the laws regulating the disposition of the public lands. The records of the provincial deputation are in evidence in this case, and from them it appears that the regulations of 1828 were entirely ignored, and that it was almost the universal custom of that body to make grants of land, so far as I am able to learn, without reference to quantity or quality. Petitions are addressed to the provincial deputation, a resolution passed, appointing a committee to examine and report as to whether or not the land asked for should be granted. On the coming of a favorable report it was adopted, and an alcade appointed and directed to put the petitioner in judicial possession, and the secretary directed to give him a certificate of title. About the same time, and in the same town, the governor was also making grants without reference to the action of the provincial deputation. In a number of instances the prefects (officers having a sort of police power in the subdivision of the department) were making grants to large tracts of land (some of which have been confirmed by Congress). So it appears that it was a poor officer indeed who did not assume to be able to dispose of the public domain belonging to the nation.

The colonization law of November 27, 1846, and decree of December 4, 1846, cover the whole subject of colonizing the vacant land belonging to the nation, but the colonization law of August 18, 1824, is not alluded to, and there is no authority in that law to dispose of the public land except by sales, etc. It is, however, decreed by the law of November 27, 1846 (Hall's Mexican Law, p. 119), that "in conformity with the provisions of the sixteenth article of the regulations issued for the execution of the law of the 1st of June, 1839, the board of

colonization is established under the immediate consent of the department of relations, which board shall be composed, as provided in the foregoing regulation, of three persons appointed by the Supreme Government." This law of June 1, 1839, as I have shown, approved the terms of the settlement made by Mexico with her creditors in the convention of 1837, and created a national board of sale for the purpose of colonizing the land by sales, leases, etc., as provided for in the law of April 4, 1837. These regulations are recognized as being in force in 1846, and its provisions are referred to and adopted by that law. There was no time from 1837 to the date of the treaty in 1848 that there was not in existence a national board of sale fully authorized and empowered to sell and convey all the vacant lands belonging to the nation which was subject to colonization. It can make no difference so far as this grant is concerned whether the law of August 18, 1824, was repealed, or only suspended, as claimed by the petitioners; if suspended the law suspending was in force when this grant was made.

I am aware of the fact that in the case of the *United States* v. *Vallejo* (1 Black, p. 553) and the case of the *United States* v. *Vigil* (13 Wall., p. 449), and a number of other cases arising under the act of March 3, 1851, relating to Mexican grants to land in California, the Supreme Court of the United States held that the Mexican law of August 18, 1824, and the executive regulations of 1828 was all the law in force in relation to making grants to the public lands belonging to the nation, except those relating to missions and towns. In the Vallejo Case the court say:

"Now the above are the only laws of the Mexican Congress passed on the subject of granting the public lands (meaning the law of August 18, 1824, and the regulations of 1828), with the exception of those relating to missions and towns, which have no bearing on

the question. No others have been produced on the argument, nor have our research found any, nor were any ever discovered by the public agents which were authorized by this Government to inquire particularly into the subject." (See Halleck's Report, March 1, 1849; Ex. Doc., first session, Thirty-first Congress, p. 119.)

The general rule is that questions repeatedly before the Supreme Court, and decided in the same way, are not open for readjudication. (*Wright* v. *Sill*, 2 Black, p. 544; *Minnesota Mining Co.* v. *National Mining Co.*, 3 Wall., p. 332.)

The rule in these cases is somewhat modified, and explained in the case of *Gaines* v. *Henson* (24 How., p. 553).

But this case stands on entirely different grounds from any alluded to in any of the decisions I have been able to find. It is manifest from an examination of the reports and decisions of the Supreme Court referred to in the Vallejo case that a number of the laws and regulations for the colonization of the public lands of the Government of Mexico, passed after the adoption of the central system in 1836, have never been considered by that court, and as I have shown said laws and regulations in terms deal with the whole question of colonization and are in direct conflict with the law of August 18, 1824 and the regulations of 1828. The correctness of the decisions of that court based on the law before it is not challenged, and on an appeal in this cause the court would only be called upon to examine laws and regulations of the Mexican Government in regard to the disposition or her public lands in force at the date of this grant which have never been presented to that court for adjudication. It has never been held by that or any other court of last resort (that I have been able to find) that when it appeared to the satisfaction of the court that a former decision had been based wholly on a statute

which had been repealed prior to such decision, such decision would not be held an exception to the rule of stare decisis, unless some party to the suit, not then before the court or some party before the court, had acquired property rights based on such former decision. The title to all the land in California claimed under Spanish or Mexican grants have long since been settled and could not be affected by any decision which might be rendered in this case in relation to the land laws of Mexico.

The decisions of the Supreme Court of the United States made under the act of March 3, 1851, do not constitute a rule of property in this case; they were rendered long subsequent to the making of this grant and subsequent to the treaty of Guadalupe Hidalgo. So it is not possible that any right to the property in question, which this court can consider, should have been acquired on the faith of such decisions.

The claimants' rights (if any) depend on the law of Mexico in force at the date of the change of flag. (See *McMickem* v. *United States*, 97 U. S., 204; *Steinback* v. *United States*, 11 Wall., p. 566; *United States* v. *Dingley*, 12 Peters, p. 467.)

"This court in passing upon the rights of claimants, or the United States must be controlled by the laws of nations, the stipulation of the treaty, and the laws and ordinances of the government making the alleged grant." (See sec. 7, act March 3, 1891, 26 United States Statutes at Large, p. 854.)

APPENDIX No. 2.

SANTA FE, N. MEX., *Sept. 20, 1899.*

MATT. G. REYNOLDS, Esq.,
United States Attorney for the Court of Private Land Claims, St. Louis, Mo.

SIR: I have examined all the grants made subsequently to April 29, 1842, which are enumerated in the abstract of archives which, under your direction, I prepared for use of the Government before the Supreme Court of the United States in suit 88, *J. Francisco Chavez* v. *The United States* (No. 14, October term, 1899), and I find that all said grants, except four, are on stamped paper.

The exceptions are the following:

The so-called grants Nos. 73 and 74, which are in fact simply allotments made in one case by a constitutional *alcalde* and in the other by a justice of the peace, within the outbounds of tracts previously set aside for the establishment of settlements.

The grant No. 94, made by the State of Texas, after her annexation to the United States.

The alleged grant to Juan Luis Ortiz, for the Sierra Mosca tract.

I have made a careful examination of the Vigil Index, in the office of the surveyor-general, in connection with this last grant, and find therein no mention of it.

Very respectfully,

WILL. M. TIPTON,
Special Agent, Court of Private Land Claims.

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